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No. 87-1241-CFX Title: Pennsylvania, Petitioner
Status: GRANTED v.
 Union Gas Company

Docketed: Court: United States Court of Appeals
January 21, 1988 for the Third Circuit

Counsel for petitioner: Knorr III, John G.

Counsel for respondent: Swift, Robert A.

Entry	Date	Note	Proceedings and Orders
1	Jan 21 1988	G	Petition for writ of certiorari filed.
2	Feb 22 1988		Brief amici curiae of New York, et al. filed.
3	Feb 23 1988		Brief of respondent Union Gas Company in opposition filed.
4	Mar 2 1988		DISTRIBUTED. March 18, 1988
5	Mar 4 1988		Letter from amicus curiae, New York, received and distributed.
6	Mar 21 1988		Petition GRANTED. *****
8	Mar 28 1988		Order extending time to file brief of petitioner on the merits until May 26, 1988.
9	May 17 1988	*	Record filed.
		*	Certified copy of briefs and partial proceedings received.
10	May 23 1988	*	Record filed.
		*	Certified copy of original record, box, received.
11	May 26 1988		Brief amici curiae of New York, et al. filed.
12	May 26 1988		Brief of petitioner Pennsylvania filed.
13	May 26 1988		Joint appendix filed. (Jt. appendix to be reprinted).
14	May 31 1988		Order extending time to file brief of respondent on the merits until July 11, 1988.
16	Jun 9 1988		Brief amicus curiae of Pacific Legal Foundation filed.
17	Jul 8 1988		Brief amici curiae of Assn. of American Publishers, Inc., et al. filed.
18	Jul 11 1988		Brief amicus curiae of Chemical Manufacturers Assn. filed.
20	Jul 11 1988		Brief amicus curiae of AFL-CIO filed.
21	Jul 11 1988		Brief amici curiae of National Music Publishers, et al. filed.
22	Jul 11 1988		Brief of respondent Union Gas Co. filed.
23	Jul 20 1988		CIRCULATED.
24	Aug 10 1988	X	Reply brief of petitioner Pennsylvania filed.
25	Aug 15 1988	D	Motion of Pacific Legal Foundation for leave to participate in oral argument as amicus curiae, for divided argument and for additional time for oral argument filed. Set for argument. Monday, October 31, 1988. (2nd case) (1 hr)
26	Aug 29 1988		Motion of Pacific Legal Foundation for leave to participate in oral argument as amicus curiae, for divided argument and for additional time for oral argument DENIED.
28	Oct 31 1988		ARGUED.

①
87-1241

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.

E I L E D

JAN 21 1988

JOSEPH F. SPANIOL, JR.
RE

OCTOBER TERM, 1987

COMMONWEALTH OF PENNSYLVANIA,

Petitioner

v.

UNION GAS COMPANY,

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether amendments to a definitional section of the Superfund Act, which make no mention of the Eleventh Amendment and which refer to State liability only in narrow circumstances not applicable here, contain the unmistakeable expression of Congressional intent necessary to override the Eleventh Amendment.

2. Whether, assuming that the amendments lift Eleventh Amendment protection, the rule that, in Commerce Clause enactments Congress may affect the states' Eleventh Amendment immunity only if States waive their immunity by continuing to operate in the federally regulated sphere, bars Congress from retroactively eliminating Eleventh Amendment protections.

3. Whether Congress' power to override Eleventh Amendment immunity under the Commerce Clause is limited by the States' right to provide vital services without subjecting themselves to federal court jurisdiction, particularly where the events forming the basis for suit occurred long before the federal scheme was enacted.

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OPINIONS BELOW

The second opinion of the Court of Appeals (Pet. App. 1a.-73a.) is reported 832 at 1343 F.2d (1987). The initial opinion of the Court of Appeals (Pet. App. 74a.-138a.) is reported at 792 F.2d 372 (1986). The opinion of the District Court (Pet. App. 139a.- 158a.) is reported at 575 F.Supp. 949 (1983).

JURISDICTION

The judgment of the Court of Appeals was entered on November 3, 1987. Pet. App. 1a. This petition is filed within 90 days of the judgment.

STATUTE INVOLVED

STATE OR LOCAL GOVERNMENT

LIMITATION -- Paragraph (20) section 101 of CERCLA (defining "owner or operator") is amended as follows:

1) Add the following new subparagraph at the end thereof:

"(D) The term 'owner or operator' does not include a unit of State or local government which acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign. The exclusion provided under this paragraph shall not apply to any

State or local government which has caused or contributed to the release or threatened release of a hazardous substance from the facility, and such a State or local government shall be subject to the provisions of this Act in the same manner and to the same extent, both procedurally and substantively as any nongovernmental entity, including liability under section 107."

2) Amend clause (iii) of subparagraph (A) to read as follows: "(iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated, or otherwise controlled activities at such facility immediately beforehand."

Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, §101(b), 100 Stat. 1613 (1986).

STATEMENT

This case began with a complaint filed in the United States District Court for the Eastern District of Pennsylvania in which the United States sought to recover from Union Gas Co. the costs incurred to clean up coal tar which had seeped into a creek. Pet. App. 10a. Suit was brought pursuant to Sections 104 and 107 of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund), 42 U.S.C. §§9604, 9607. Pet. App. 10a. Union Gas filed third-party claims against the Commonwealth of Pennsylvania and a Pennsylvania municipality, the Borough of Stroudsburg.¹ Pet. App. 10a, 79a.

¹The borough is not a party to this appeal. Pet. App. 80a n.3.

The District Court dismissed the claim on Eleventh Amendment grounds². Pet. App. 158a. Initially, the Court of Appeals affirmed (Pet. App. 118a), but following remand from this Court to reconsider the question in light of intervening amendments to CERCLA, the Third Circuit reversed. Pet. App. 73a.

1. The pleadings disclose that predecessors of Union Gas owned and operated a facility which produced coal tar as a byproduct of its operation. Pet. App. 76a-77a. Long after the plant was closed the Commonwealth acquired portions of Union Gas' land and, through

the borough, also acquired easements near a creek for flood control. Pet. App. 9a, 76a-77a. In the 1950's, the State, together with the Army Corps of Engineers, dug levees, erected dikes and changed the flow of the creek to aid in flood protection. Pet. App. 77a. In October of 1980, the State again was engaged in excavation along the creek when coal tar began to seep into the water. Pet. App. 77a.

The Environmental Protection Agency (EPA) found that the coal tar was a hazardous substance thus triggering the protections of CERCLA. Pet. App. 77a. The Commonwealth in cooperation with federal authorities cleaned up the spill. Pet. App. 9a. After reimbursing the Commonwealth for its costs, the

²Following the dismissal, the United States filed an amended complaint, Union Gas filed a new third-party claim, the Commonwealth moved to dismiss and the District Court dismissed the third party claim, relying on its initial opinion. Pet. App. 81a.

United States sued Union Gas.³ Pet. App. 9a-10a.

The District Court concluded that the third-party claim was barred by the Eleventh Amendment because CERCLA lacked clear language eliminating the States' immunity. Pet. App. 151a-152a. Following a settlement between the United States and Union Gas, Union Gas appealed dismissal of its third-party claim. Pet. App. 11a.

2. In its first opinion, the Court of Appeals agreed with the District Court. The court found in CERCLA, as it read at that time, no clear language overturning Eleventh Amendment immunity. The legislative history similarly was

silent on the subject. The Court of Appeals affirmed.

3. Union Gas filed a petition for certiorari and soon thereafter CERCLA was amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986) (SARA). Eventually, the Court vacated the judgment of the Court of Appeals and remanded the case for reconsideration in light of SARA. Union Gas Co. v. Pennsylvania, No. 86-597 (January 12, 1987).

This time the Third Circuit discerned in SARA a clear Congressional intent to eliminate Eleventh Amendment immunity. Specifically, the court found that amendments to the definitional section of CERCLA, 42 U.S.C. §9601(20) (D), now made it plain that States are liable under the statute. Pet. App. 21a-23a. Aside from the language of

³The United States alleged that it had spent \$1,400,000 on the clean-up and sought recovery from Union Gas for \$720,000. Pet. App. 81a.

the amendments, the Court of Appeals found support for its conclusion in provisions eliminating the sovereign immunity of the United States and providing for citizens suits. Pet. App. 23a-28a.

Having resolved the statutory interpretation question, the Court of Appeals faced the question whether Congress had the power under the Commerce Clause to alter Eleventh Amendment protections. First, the court concluded that the extent of Congress' power to affect Eleventh Amendment immunity did not vary depending upon whether Congress was acting pursuant to its Article I powers or its power to enforce the Fourteenth Amendment. Pet. App. 66a. The court then decided that, so long as

Congress expressed itself clearly, there were no constraints on its ability to eliminate the Eleventh Amendment safeguards when it was acting under the Commerce Clause. Pet. App. 66a-67a. Finally, the court ruled that the SARA amendments could be applied retroactively because the case still was on appeal when the law was amended. Pet. App. 67a-72a.⁴

⁴The Court of Appeals stayed the mandate pending disposition of this petition.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals raises issues of substantial nationwide importance concerning the scope of liability under the Superfund Act and the nature of Congress' power to affect the States' Eleventh Amendment immunity. Despite the fact that the statute makes no mention of the Eleventh Amendment, refers to State liability only in a definitional provision and nowhere indicates clearly that Congress focused precisely on state liability to private parties, the Third Circuit has opened the States' coffers. This in itself presents immediate, serious consequences for all the States. EPA has listed 22,000 sites as potential Superfund sites, H. Rep. No. 99-253(V)(1986), p. 2, with cleanup costs estimated to

approach \$100 billion. H. Rep. No. 99-253(I) (1985), p. 55. As the amici States explain more particularly, even before the Third Circuit's decision, numerous third-party claims have been pressed against States, some as seemingly bizarre as the assertion that a State is liable for hazardous releases from a site cordoned off by police because it was the scene of a suspected crime.⁵ This trend can be expected to intensify, encouraged by the decision in this case.

The Third Circuit's decision raises disturbing questions not only about Superfund liability, but also regarding the vitality of the Eleventh Amendment. The Court of Appeals failed

⁵See United States v. Freeman, Civil Action No. 86-748-E (W.D.N.Y.), which is discussed more fully in the States' amicus brief.

to address adequately the question, posed in this case as well as a legion of others arising under CERCLA before the SARA amendments, whether the Eleventh Amendment permits Congress to sweep aside immunity retroactively. Certainly, it is of immediate importance that the question of retroactive liability be settled so that States do not incur needlessly the enormous litigation costs associated with Superfund cases.

The Third Circuit's decision is of critical importance for a final reason. The court, by refusing to recognize any substantive limits on Congress' authority to limit Eleventh Amendment immunity, has eliminated almost entirely any meaningful role for that provision. In so holding, the Court of Appeals swept aside without more than a passing glance this Court's

repeated admonition, often in the face of vigorous dissent, that the Eleventh Amendment embodies the fundamental values of sovereign immunity. This sharp break in Eleventh Amendment jurisprudence justifies review at this time.

1. Just last term the Court reaffirmed that States are immune from suit in federal court in the absence of "an unequivocal expression that Congress intended to override Eleventh Amendment immunity." Welch v. Texas Department of Highways and Public Transportation, No. 85-1716 (June 25, 1987), slip op. at 8, citing Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985); Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 99 (1984); and, Quern v. Jordan, 440 U.S. 332, 342-345

(1979). The Third Circuit, although it paid lip service to this rule (Pet. App. 14a-17a), failed to heed it.

Nothing in CERCLA as originally enacted demonstrates that Congress "focused directly" on unrestricted State liability to private parties. See Hutto v. Finney, 437 U.S. 678, 698, 698 n.31 (1978). Prior to SARA, the Superfund Act made no explicit reference to the possibility of State liability to private parties. In its first opinion, the Court of Appeals held quite correctly that it was not enough to override the Eleventh Amendment for States to be literally included within the terms of a regulatory statute. Pet. App. 101a. This is particularly true where, as here, the States' inclusion subjects them to liability to the United States.

Pet. App. 104a. SARA's limited alteration of the statutory scheme should not have altered this result.

SARA makes no explicit reference to the Eleventh Amendment and does not by its terms clearly lift the bar of immunity. In fact, the plain language of the amendment on which the Court of Appeals focused makes it abundantly clear that State liability was confined to a carefully limited set of circumstances not applicable here. The amendment to CERCLA's definition of "owner or operator," is entitled "State or Local Government Limitation." (Emphasis supplied). According to the sponsor of the amendment, it was intended to narrow, not expand, the scope of State liability as it stood

under the original version of CERCLA.⁶ See Comments of Senator Stafford, 131 Cong. Rec. 11619 (daily ed. Sept. 17, 1985).

The amendment deals entirely with the circumstances under which a State or local government can be held liable for releases from sites which the government entities acquire involuntarily. Generally, government units are not liable for releases from sites acquired unwillingly. But this "exclusion" does not apply if the government agency "caused or contributed to the release." "[S]uch a State or local government," that is, one which has caused or contributed to a release from a site acquired involuntarily, is subject to liability under the statute. 42 U.S.C. §9601(20)(D).

⁶The amendment is reproduced in full on pages 2-3 of this petition.

About the only things clear from this rather convoluted definitional amendment is that it applies only to sites acquired by governments involuntarily and that it severely restricts governmental liability for releases from those sites. It says nothing about the Eleventh Amendment and it does not clearly subject States to unlimited liability to private parties. The obvious purpose of this change in law was to protect State and local governments from liability, even to the United States, if they acquired a site unwillingly. The Conference Committee's report confirms this view. H. Rep. No. 99-926, p. 185-186 (1986).

The error in the Third Circuit's interpretation of SARA becomes apparent when its implications are fully explored.

We must remember that the Court of Appeals relies entirely on the language of §101(20)(d), 42 U.S.C. §9601(10)(D), for its conclusion that States generally are liable to private parties in federal court. But the new §101(20)(D) imposes liability on State and local governments only if they "caused or contributed" to the release. This "fault" standard contrasts dramatically with the strict liability standard which CERCLA always has been understood to impose. See, e.g., State of New York v. Shore Realty Corp., 759 F.2d 1032, 1042 (2d Cir. 1985). In fact, the legislative history of SARA itself demonstrates that Congress intended for CERCLA liability to be "strict . . . In other words, liability may be imposed without fault . . ." H. Rep. 99-253 (II)(1985), p. 15. The fact that Third Circuit's interpretation

of the statute would result in a standard of liability totally at odds with the one Congress plainly intended to apply is strong evidence that the court has misread the statute.

However one reads SARA one conclusion is inescapable - it hardly is a clear expression of Congressional intent to override State immunity from federal court suit. The Court should take this early opportunity to set the matter straight before substantial resources are wasted in litigation over claims for which the federal courts lack jurisdiction.

2. The events which gave rise to Union Gas' claim occurred in 1980, many years before CERCLA was amended by SARA 1986. Yet the Court of Appeals apparently had no difficulty with applying the new law retroactively. The

court analyzed (Pet. App. 67a-72a) the retroactivity question as if it were a garden variety one to be judged against the normal rule - namely, that appellate courts must apply the law in effect when the appeal is decided. See, e.g., United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801). But the Court of Appeals made a serious misstep when it failed to appreciate that the usual rule is inapplicable where the new law purports to eliminate pre-existing Eleventh Amendment immunity.

a. "[T]he Eleventh Amendment embodies a broad constitutional principle of sovereign immunity." Welch v. Texas Department of Highways and Public Transportation, slip op. at 16. "[T]he States, in the absence of consent, are immune from suits brought against them [in federal court]." Monaco v. Mississippi, 292 U.S. 313, 329 (1934).

The Court repeatedly has emphasized the central role of consent or waiver in Eleventh Amendment jurisprudence. See Atascadero State Hospital v. Scanlon, 473 U.S. 234, 139-240, 246 (1985); Edelman v. Jordan, 415 U.S. 651, 672 (1974); Employees v. Missouri Dept. of Public Health and Welfare, 411 U.S. 279, 280-281 n.1, 285 (1973). The Court's decisions which address federal schemes erected, like the one here, pursuant to Congress' power to regulate commerce, routinely have looked for evidence of consent or waiver.

In Parden v. Terminal Ry. Co., 377 U.S. 184 (1964), the Court concluded that the Eleventh Amendment was not a bar to federal jurisdiction under the Federal Employees' Liability Act, 45 U.S.C. §51 *et seq.*, because

Congress conditioned the right to operate a railroad in interstate commerce upon amenability to suit in federal court as provided by the Act; by thereafter operating a railroad in interstate commerce, Alabama must be taken to have accepted that condition and thus to have consented to suit.

Id. at 192. The Court carefully explained that Congress may not at its whim make the Eleventh Amendment disappear. "It remains the law that a State may not be sued by an individual without its consent . . . Alabama, when it began operation of an interstate railway . . . necessarily consented to suit. . . ." *Ibid.*⁷

⁷The particular result in *Parden* was overruled by *Welch v. Texas Department of Highways and Public Transportation*. The Court did not, however, overrule *Parden's* discussion of the need for State consent. The Court, instead, reserved the question. Slip op. at 6.

The idea that a Commerce Clause statute can eliminate Eleventh Amendment immunity only if a State can be said to have waived it by engaging in federally regulated conduct was reinforced in *Employees of Dept. of Pub. Health & Welfare v. Missouri Dept. of Pub. Health & Welfare*, 411 U.S. 279 (1972). The Court noted that Congress certainly has the power to determine that activities conducted by the States have such an effect on interstate commerce as to call for a uniform national approach. *Id.* at 284. But it must appear clearly "that Congress conditioned the operation of these [State] facilities on the forfeiture of immunity from suit in a federal forum." *Id.* at 285.

The spending power cases have a included similar analysis. The question has been viewed as one of waiver or consent - a court must satisfy itself

that Congress intended to subject States to suit in federal court and that "the State by its participation in the program authorized by Congress had in effect consented" to suit. Edelman v. Jordan, 415 U.S. 651, 672 (1974). Obviously, there can be "no knowing acceptance" by the States of conditions imposed by Congress, unless they are "cognizant of the consequences of participation." Pennhurst State School & Hospital v. Halderman, 451 U.S. 1, 17 (1981); see also Atascadero, 479 U.S. at 246-247 and n.5.

Despite this apparently uniform approach to Eleventh Amendment questions, the Court recently has declined to decide in advance of the necessity whether State consent is an integral feature of the immunity analysis in cases involving

Congress' Article I powers. First, in County of Oneida. New York v. Oneida Indian Nation of New York State, 470 U.S. 226, 252 (1985), and more recently, in Welch v. Texas Department of Highways and Public Transportation, slip op. at 6, the Court put off the question for another day. Should the Court conclude that CERCLA, as amended by SARA, provides a clear expression of Congress' intention to override the Eleventh Amendment, then the question of Congressional authority to abrogate immunity under the Commerce Clause absent State consent is squarely presented.

b. The Court of Appeals perceived the constitutional question to be "whether Congress' Article I commerce clause powers are sufficient to abrogate the states' eleventh amendment immunity."

Pet. App. 34a. But this is a misperception, for the initial constitutional issue is far narrower: whether, assuming Congressional power to eliminate Eleventh Amendment immunity in laws such as CERCLA, Congress has the power to do so retrospectively. The Court of Appeals failed to address this important question.

The Eleventh Amendment strikes a balance between the federal and state governments "[b]y guaranteeing the sovereign immunity of the States against suit in federal court" Atascadero State Hospital v. Scanlon, 473 U.S. at 242. While the Court of Appeals quite correctly observed that all provisions of the Constitution are of equal validity, Pet. App. 40a, the court's decision has the effect, not of reading

the Eleventh Amendment together with Article I, but of sanctioning the nullification of the Eleventh Amendment. Although the Third Circuit believed that its conclusion was necessary to give life to Congress' power to regulate commerce, Pet. App. 56a-57a, in fact, such a radical approach hardly is necessary to preserve Congress' power.

The Eleventh Amendment concepts of consent and waiver, as developed in Parden, Employees, Edelman and Atascadero, properly accommodate Congressional power exercised under Article I with the States' historic immunity. Congress, despite the Eleventh Amendment, retains the power to regulate State activities and subject the States which operate within the federally regulated domain to federal court jurisdiction. To accomplish this,

Congress must make its intentions known with unmistakable clarity. Atascadero State Hospital v. Scanlon, 473 U.S. at 243.

The clear statement rule serves two purposes. First, it insures that Congress consciously has focused on the question of State immunity and resolved it in favor of subjecting States to federal court jurisdiction. Welch v. Texas Department of Highways and Public Transportation, slip op. at 8. Secondly, consistent with "the fundamental rule of jurisprudence" "that a State may not be sued without its consent," Ex Parte State of New York No. 1, 256 U.S. 490, 497 (1921), the clear statement requirement preserves the States' freedom of choice. The States are notified that they may maintain their sovereign protection by steering clear of the federally regulated sphere; but, if they

engage in activities which Congress has chosen to regulate, the States are deemed to have consented to federal court jurisdiction. See Edelman v. Jordan, 415 U.S. at 672-673.

In this case, Pennsylvania never had a choice. The coal tar was released in 1980, but the law purporting to eliminate State immunity was not passed until 1986. By glossing over this problem, the Court of Appeals effectively has read out of the Constitution any vestige of State sovereign immunity, as that concept has been understood since the Eleventh Amendment was added to the Constitution. This departure from the course of prior decisions justifies the Court's review.

3. Should the Court reject the narrow ground for reversal discussed above, then it must confront the question

which the Court of Appeals addressed at length - what if any limitations does the Eleventh Amendment place on Congress' Article I power to regulate commerce? The Third Circuit's conclusion - that the sole function of the Eleventh Amendment is to require that Congress speak clearly when eliminating its protections - flies in the face of the Court's unwavering efforts to preserve real protection for State sovereignty. At the very least, the question is of tremendous immediate importance for all fifty States and the Federal Government alike. Review at this time is essential.

Recently, the Court, in the face of the virtual elimination of the Tenth Amendment as a source of judicially enforceable States' rights, see Garcia v. San Antonio Metropolitan

Transit Authority, 469 U.S. 528 (1985), stated in the strongest terms possible that the Eleventh Amendment continues to protect the balance of power between the States and the Federal Government which is necessary to safeguard our fundamental freedoms. Atascadero State Hospital v. Scanlon, 473 U.S. at 242. Because "the Commerce Clause . . . has grown to [such] vast proportions in its applications . . ." Employees v. Missouri Public Health & Welfare Dept., 411 U.S. at 285, it effectively writes the Eleventh Amendment out of the Constitution to conclude that, so long as Congress makes its intention clear, it can act under its Commerce Clause power to regulate virtually every facet of State government and then subject recalcitrant States to suit in federal court.

In his separate opinion in the Employees case, Justice Marshall recognized that the power of Congress to regulate commerce did not necessarily give Congress the added power to subject States to suit in federal court absent their consent. 411 U.S. at 290-298 (Marshall, J., concurring in the result). He viewed the question as involving, not some general question of immunity from regulation, "but merely the susceptibility of the States to suit before a federal tribunal. Because of the problems of federalism inherent in making one sovereign appear against its will in the courts of the other . . .," federal judicial power has been restricted to take account of the interests of federalism. *Id.* at 294. This analysis should have informed the

decision of the Court of Appeals and moved it to resolve the case in favor of the Commonwealth.

As Justice Marshall again observed in Employees, it is impossible to square with any reasonable notion of consent or waiver the idea that a State may be required to choose between discontinuing "vital public services" carried out by facilities in place long before the federal law was passed and submitting to suit in federal court. *Id.* at 296 (opinion concurring in result). This observation applies even with greater force here, where not only was the public apparatus for flood control in operation before SARA was enacted, but the specific acts allegedly giving rise to liability were completed long before the statute was put into effect.

The Third Circuit's comparison between Congress' powers under Article I and under the Fourteenth Amendment (Pet. App. 40a-47a) is inapt. This Court has held quite clearly that the Fourteenth Amendment gives Congress the power to subject unconsenting States to federal court jurisdiction. See Atascadero State Hospital v. Scanlon, 473 U.S. at 238. The Fourteenth Amendment is unique in this regard - not because it was ratified after the Eleventh Amendment - but because it operates as a direct source for restraints on State activities which infringe on individual rights. See Strauder v. West Virginia, 100 U.S. 303, 306-308 (1880). By contrast, the other powers entrusted to Congress are primarily for the purpose of protecting the federal system from State incursion. It makes sense to tell

States that they must choose either to stay out of a federally regulated sphere or consent to federal court jurisdiction; such a choice makes no sense when the concern is for protection of individuals' civil rights.

The Third Circuit's revolutionary conclusions, sweeping as broadly as they do, effectively reduce the Eleventh Amendment to a requirement for sharp draftsmanship. In so doing, the Court of Appeals has emasculated this important protection for State sovereignty. The Court should review this remarkable conclusion.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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Date: January 21, 1988

A P P E N D I X

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-1177

UNITED STATES OF AMERICA,

v.

UNION GAS COMPANY,

v.

COMMONWEALTH OF PENNSYLVANIA
and THE BOROUGH OF STROUDSBURG
UNION GAS COMPANY,

Appellant

On Appeal from the United States
District Court for the Eastern
District of Pennsylvania
(D.C. Civil No. 83-2456)

Argued January 7, 1986
Reargued Following Remand
From the Supreme Court
June 22, 1987

Before: WEIS, HIGGINBOTHAM,
BECKER, Circuit Judges

(Filed November 3, 1987)

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OPINION ON REMAND
FROM THE SUPREME COURT

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BECKER, Circuit Judge.

This appeal is before us for a second time, following remand by the Supreme Court. It presents the same ultimate question that we addressed earlier: does the eleventh amendment bar defendant-third party plaintiff Union Gas Company from suing the Commonwealth of Pennsylvania in federal court for monetary damages in an action arising under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, or Superfund), 42 U.S.C. § 9601 *et seq.* (1982). See United States v. Union Gas, 792 F.2d 372 (3d Cir. 1986) (Union Gas I). In our earlier decision, we affirmed the district court's judgment determining that the eleventh amendment barred the suit. The Supreme

Court granted certiorari, vacated our earlier decision, and remanded the case "for further consideration in light of the Superfund Amendments and Reauthorization Act of 1986 [SARA], Pub. L.No. 99-499." Union Gas v. Pennsylvania, 107 S. Ct. 865, 865 (1987).

We now reverse the district court's judgment, concluding that, in contrast to the legislative language upon which we based Union Gas I, SARA provides CERCLA with the requisite unmistakably clear language needed to abrogate the states' eleventh amendment immunity.¹ This conclusion on specificity requires us to reach an important,

1. Congressional "abrogation" does not refer to an impermissible attempt to override a constitutional guarantee by a

(FOOTNOTE CONTINUED ON NEXT PAGE)

difficult and controversial issue -- the power of Congress to abrogate the eleventh amendment not by the later fourteenth amendment but by the commerce power of the earlier Article I. We conclude that Congress possessed the constitutional power to abrogate the immunity and that we must apply this valid congressional enactment to the present case.

(FOOTNOTE CONTINUED)

statutory decree. Rather, in traditional eleventh amendment parlance, abrogation refers to the ability of Congress to create a cause of action for money damages enforceable by a citizen suit against a state in federal court. See In re McVey Trucking, 812 F.2d 311, 314 n.3 (7th Cir. 1987), petition for cert. filed, 56 U.S.L.W. 3028 (U.S. July 28, 1987). The issue is thus not congressional power to legislate, but the effectiveness of a congressional grant of jurisdiction despite the eleventh amendment's limitation on Article III.

I. FACTS AND PROCEDURAL HISTORY

Our earlier opinion, Union Gas I. set forth both the facts and the procedural history of the case in detail. See 792 F.2d at 374-75. We briefly review them here.

Predecessors of Union Gas Company owned and operated a facility that allegedly released hazardous substances at a site near Brodhead Creek in Stroudsburg, Pennsylvania. Long after the plant had been closed and dismantled, the Commonwealth of Pennsylvania, acting pursuant to an easement for flood control, excavated at the former Union Gas site and struck a large deposit of hazardous substances that began to seep into Brodhead Creek. Alerted to the seepage, the Environmental Protection Agency (EPA) ordered a clean-up, which Pennsylvania and the United States performed jointly. The United States,

expending a total of approximately \$720,000, reimbursed the Commonwealth for all of its costs.

The United States sued Union Gas in the district court for the Eastern District of Pennsylvania under CERCLA, 42 U.S.C. §§ 9604, 9607 (1982), for recoupment of costs incurred in cleaning up the Brodhead Creek spill. Union Gas, in turn, filed a third-party complaint against Pennsylvania, alleging that the Commonwealth had "negligently caused, or contributed to, the discharge" and should therefore shoulder at least part of the clean-up costs. 792 F.2d at 375. Believing that the eleventh amendment barred Union Gas' suit against it, the Commonwealth moved to dismiss, and the

district court granted the Commonwealth's motion. Subsequently, the United States and Union Gas settled the principal action and the district court dismissed the lawsuit.

Union Gas thereupon appealed the district court's dismissal of Pennsylvania as a defendant, and a divided panel of this Court affirmed.² Noting that the Supreme Court requires that "Congress must express its intention to abrogate the Eleventh Amendment in unmistakable language in the statute

²Judge Higginbotham dissented, noting that

"[t]he basic issue is whether the [CERCLA] definitional section is sufficiently adequate in itself to find legislative intent to abrogate sovereign immunity. I think it is."

792 F.2d at 384 (Higginbotham, J., dissenting). On remand he reaffirms the views expressed therein.

itself," Atascadero State Hospital v. Scanlon, 473 U.S. 234, 243 (1985)(footnote omitted), the panel found no such unmistakable expression of intent to abrogate in CERCLA.

Union Gas petitioned for certiorari on October 8, 1986. On October 17, the President signed the SARA amendments to CERCLA. Thereafter, the Supreme Court vacated our prior opinion and judgment and remanded the case for reconsideration in light thereof.

II. CONGRESSIONAL INTENT TO ABROGATE THE STATES' ELEVENTH AMENDMENT IMMUNITY IN SARA

The eleventh amendment provides that:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against

one of the United States by
Citizens of another State, or
by Citizens or Subjects of
any Foreign State.

U. S. Const. amend. XI. Although the amendment does not expressly address suits against a state by its own citizens, the Supreme Court has interpreted it as embodying state sovereign immunity and has therefore constructed a presumptive bar against suits by citizens of the defendant state. See Welch v. State Department of Highways and Public Transportation, 107 S. Ct. 2941 (1987); Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984) (Pennhurst II); Edelman v. Jordan, 415 U.S. 651 (1974); Hans v. Louisiana, 134 U.S. 1 (1890); see also infra typescript at 27-28 (discussing extent of presumption).

A. Standards for Imputing Congressional Intent to Abrogate the Eleventh Amendment

In our original panel opinion, we noted that eleventh amendment immunity "can be avoided in only two ways: (a) Congress can abrogate it by providing through statute for suits against states, or (b) states can waive their sovereign immunity and consent to be sued." Union Gas I, 792 F.2d at 376 (emphasis in original). After the vacatur of our previous opinion, the Supreme Court decided Welch and noted the same two exceptions to the eleventh amendment's reach. See 107 S.Ct. at 2945-46.

We also explained in Union Gas I that, because of "the eleventh amendment's importance in maintaining the balance of power between state and federal interests." 792 F.2d at 376,

the Supreme Court requires Congress to "express its intention to abrogate the Eleventh Amendment in unmistakable language in the statute itself." *Id.* (quoting Atascadero State Hospital v. Scanlon, 473 U.S. at 243); see also Pennhurst II, 465 U.S. 89, 99 (1984); Quern v. Jordan, 440 U.S. 332, 342-45 (1979):

The Court has insisted that the statute, when read literally, not merely allow suits against the state, but that it do so with such specificity that it is clear that Congress consciously and directly focused on the issue of state sovereign immunity and chose to abrogate it.

792 F.2d at 376 (citations omitted).

The Supreme Court reaffirmed these principles in Welch, which emphasized that Congress can create an exception to the reach of the eleventh amendment only if it expresses its intent to do so in unmistakable language in the

statute itself. Welch overturned, at least in part, the decision in Parden v. Terminal Railway of Ala. Docks Dept., 377 U.S. 184 (1964), in which the Court had found that Congress had intended to abrogate states' eleventh amendment immunity when it enacted the Federal Employers Liability Act (FELA) and regulated "[e]very common carrier by railroad while engaging in commerce between any of the several States" 45 U.S.C. § 51 (1982). "Every common carrier," held Parden, included state-owned railroads and thus abrogated their eleventh amendment immunity. Welch explicitly overruled this holding in Parden, reinterpreting the very same provision of the FELA as it was incorporated by reference in the Jones Act.

Although our later decisions do not expressly overrule Parden, they leave no doubt that Parden's discussion of congressional intent to negate Eleventh Amendment immunity is no longer good law In subsequent cases the Court consistently has required an unequivocal expression that Congress intended to override Eleventh Amendment immunity. Accordingly, to the extent that Parden v. Terminal Railway . . . is inconsistent with the requirement that an abrogation of Eleventh Amendment immunity by Congress must be expressed in unmistakably clear language, it is overruled.

107 S. Ct. at 2948 (citations and footnote omitted).

B. CERCLA and the Eleventh Amendment

In Union Gas I, we found that the language and structure of CERCLA did not sufficiently evince Congress' intention to abrogate the states' eleventh

amendment immunity. SARA has now changed both the language and structure of CERCLA, and, as we explain below, SARA demonstrates Congress' unmistakable intent to subject the states to suit in federal court.

In Union Gas I, we acknowledged both that the liability section of CERCLA allows those who have incurred clean-up costs to sue "any person" who owned or operated the waste site for all costs incurred in the removal effort, 42 U.S.C. § 9607(a) (1982), and that the definitional section defines person to include the "United States Government, [a] State, municipality, commission, political subdivision of a State, or any interstate body." 42 U.S.C. § 9601(21) (1982). We found this language insufficient to abrogate the eleventh amendment for two reasons.

First, the inclusion of a state in the § 9601(21) definition of persons allows the United States, which does the vast bulk of clean-up work, to sue states for reimbursement under § 9607(a). We concluded that, because of the structure of CERCLA, the language that allows the federal government to sue states cannot be deemed to express Congress' unmistakable intention to abrogate the states' eleventh amendment immunity from suits by individuals against state government.³ Second, we noted the significance

³The eleventh amendment clearly permits statutes that provide for suits by the federal government against the states, see, e.g., United States v. Mississippi, 380 U.S. 128, 140-41 (1965) yet such statutes do not operate to abrogate the states' constitutional immunity from suits in federal court brought by individuals. See Employees of Dep't of Pub. Health & Welfare v. Missouri Dep't of Pub. Health & Welfare, 411 U.S. 279, 285-86 (1972).

of § 9607(g), which explicitly waives the United States' sovereign immunity.⁴ We interpreted the existence of this explicit waiver of federal sovereign immunity as a further indication that the definitional section was insufficient, in and of itself, to subject a

⁴At the time, § 9607(g) read in its entirety:

Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any non-governmental entity, including liability under this section.

42 U.S.C. § 9607(g) (1982). This waiver was amended and recodified at 42 U.S.C.A. § 9620(a)(1) (West Supp. 1987) by SARA. In order to avoid confusion, we continue to refer to that provision as § 9607(g).

state governmental body to suit, for reading CERCLA's definitional section to waive federal sovereign immunity would render § 9607(g) superfluous. We therefore reasoned that to impute to Congress the intention to abrogate states' immunity we would require a specific reference to states' immunity or some other explicit indication of abrogation. See Union Gas I, 792 F.2d at 380 ("abrogation of states' eleventh amendment immunity requires no less a showing of congressional intent than does waiver of federal sovereign immunity").

In SARA, however, Congress enacted the unmistakably clear statutory language that demonstrates its intent to abrogate the states' eleventh amendment

immunity. Section 101 of SARA, entitled "Amendments to Definitions," adds a new paragraph to CERCLA which defines "owner or operator":

The term "owner or operator" does not include a unit of State or local government which acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign. The exclusion provided under this paragraph shall not apply to any State or local government which has caused or contributed to the release or threatened release of a substance hazardous from the facility, and such a State or local government shall be subject to the provisions of this Act in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title [cost recovery actions].

42 U.S.C.A. § 9601(20)(D)(West Supp. 1987)
(emphasis supplied).

Two points of analysis support our conclusion that the amendment to § 9601 provides the requisite unmistakably clear language. First, the plain language of the statute indicates a clear intention to abrogate. Congress provided that a state "shall be subject to the provisions of this Act in the same manner and the same extent" as any nongovernmental entity. As the emphasized portion of § 9601(20)(D) demonstrates, Congress, in amending CERCLA, specifically contemplated the unique position of states in the constitutional scheme and, in certain circumstances, chose to make them liable to suit by individuals in federal court.

Second, SARA now applies exactly the same waiver to states that it applies to the federal government. The language

of the final portion of § 9601(20)(D) replicates for all practical purposes § 9607(g), which waives the sovereign immunity of the federal government. Thus, CERCLA, as amended by SARA, treats the United States and the states similarly -- enumerating both as "persons" and withdrawing the immunity from both. Even if we were to require a greater showing of congressional intent to abrogate the states' eleventh amendment immunity than is necessary to waive the federal government's sovereign immunity, see Union Gas I, 792 F.2d at 380 n.13, this higher threshold would be satisfied by SARA. SARA's definitional section, which replicates the federal waiver and which specifically contemplates the function of the states as separate sovereigns, addresses this concern.

In Union Gas I, the panel, relying on the special federal waiver section of CERCLA, believed that Congress, by explicitly waiving federal sovereign immunity in § 9607(g), demonstrated that more than enumeration in a definitional section was required to achieve governmental immunity. Although this argument based on § 9607(g) is no longer tenable, given the SARA amendments to that section, we must nevertheless grapple with the question of whether definitional language alone may express congressional intent as to abrogation. As a general matter, we believe that mere enumeration in a definitional section remains insufficient as evidence of congressional intent to abrogate. In our case, however, the definitional section contains a substantive direction that "state or local government shall be

subject to the provision of [CERCLA] in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity including liability under section 107." 42 U.S.C.A. § 9601(20)(D)(West Supp. 1987). Although found in a definitional section, the language is not definitional in character; it far exceeds the bare enumeration we found insufficient to indicate congressional intent to abrogate in Union Gas I. On the contrary, its clear mandate, replicating the language of the federal waiver, satisfies our concerns about congressional intent to render the states amenable to suit.

A third point arises from SARA's amendment of the act's federal immunity waiver in § 9607(g). In Union Gas I, we

found that the existence of a special section waiving federal immunity indicated that Congress had given special thought to waiving federal immunity and had not given equivalent attention to the question of state immunity. Essentially we inferred that Congress, by not providing an analogous state waiver, did not intend to abrogate the eleventh amendment. This federal waiver, now codified at 42 U.S.C.A. § 9620(a)(1) (West Supp. 1987), has been amended, however, to provide that "[n]othing in this section shall be construed to affect the liability of any person or entity under sections 9606 [i.e., abatement actions] and 107 [i.e., cost recovery actions]." This amendment precludes the reading of § 9607(g) employed in Union Gas I, which construed the federal waiver "to affect the liability of" states.

The explicit abrogation of the eleventh amendment in SARA distinguishes this case from Employees of Department of Public Health & Welfare v. Missouri Department of Public Health & Welfare, 411 U.S. 279 (1972). As we noted in Union Gas I, Employees demonstrates that the statutory suggestion that states might be sued, when found in a provision separate from the one that creates the cause of action, may be insufficient to demonstrate congressional intent. Here, too, there are separate provisions concerning liability and amenability of states to suit in federal court. However, the clear congressional language provided by SARA overcomes this concern.

In Union Gas I, we did not confine our examination to the words of CERCLA. Rather, because these sections

had not by their language evinced the congressional intent to abrogate, we canvassed other areas of the statute for such an indication. Having found that Congress in SARA has now enacted clear statutory language to abrogate the states' eleventh amendment immunity in §§ 9601(20)(D), 9620(a)(1), we need not address the other areas. Even if they remain inconclusive after SARA, they do not operate to nullify the clear statutory language found in other provisions.

For example, SARA adds a citizen suit provision to CERCLA that provides for suits "against any person (including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution)." 42 U.S.C.A. § 9659(a)(1)(West Supp. 1987). While this provision expressly prevents abrogation of eleventh amendment immunity

in citizen suits under CERCLA, it does not operate to nullify such abrogation in § 9607 liability actions. To the contrary, its inclusion implies that CERCLA had elsewhere abrogated states' eleventh amendment immunity, but did not extend that abrogation to § 9659 citizen's suits. Congress had no reason to declare the states immune from citizens' suits unless it had abrogated the states' eleventh amendment immunity elsewhere in the act. By holding that Congress abrogated the eleventh amendment for some provisions of CERCLA, we give effect to the § 9659(a)(1) limitation on citizen's suits. See 2A Sutherland Statutory Construction § 46.06 (4th ed. 1984 rev.) ("A statute should be construed so that effect is given to all its

provisions, so that no part will be inoperative or superfluous.").

Moreover, distinguishing citizens' suits from liability actions for eleventh amendment purposes makes perfect sense in light of the differing functions of the two provisions. Section 9659 suits are designed to allow citizens, acting as private attorneys general to bring civil actions to ensure effective implementation of CERCLA. Section 9706 suits, on the other hand, provide compensation for liability, and hence are more defined and circumscribed by actual harms already suffered. Therefore, it is perfectly reasonable to assume that Congress intentionally limited the reach of citizen actions but chose not to do so for liability suits.

We read the applicable Supreme Court precedent to instruct us to look

first at Congress' statutory language as the best indication of intent to abrogate the eleventh amendment; only in the absence of clear language are we to rely on the legislative history of an enactment. See Hutto v. Finney, 437 U.S. 678, 698 n.31 (1978). Although we need not rely on the legislative history of SARA because we find that the amendments have provided the requisite clear language, the legislative history supports our holding and would sustain it even were the statutory language less clear.

Originally, neither the Senate nor House version of SARA § 101(b)(1) copied the waiver language of § 9607(g) to abrogate state eleventh amendment immunity. However, the conference committee inserted language that replicated the federal waiver into the definition section, stating that its purpose was

"to clarify that if the unit of government caused or contributed to the release or threatened release in question, then such unit is subject to the provisions of CERCLA, both procedurally and substantially, as any non-governmental entity, including liability under section 107 and contribution under section 113.

"H.R. Conf. Rep. No. 962, 99th Cong., 2d Sess. 185-86, reprinted in 1986 U.S. Code Cong. & Admin. News 3276, 3278-79. To the extent that the added language serves to "clarify" CERCLA, it amounts to a subsequent declaration of congressional intent that deserves great weight.

Red Lion Broadcasting v. F.C.C., 395 U.S. 367, 380-82 (1969).

In sum, SARA contains statutory language that demonstrates the requisite unmistakable congressional intent to abrogate the states' eleventh amendment

immunity from suit, and SARA's legislative history corroborates this view.

III. CONGRESSIONAL POWER TO ABROGATE THE STATES' ELEVENTH AMENDMENT IMMUNITY

Appellee Commonwealth of Pennsylvania and the amici states correctly note that, if we find that Congress has clearly indicated its intent to abrogate the eleventh amendment, we must face a constitutional issue: whether Congress' Article I commerce clause powers are sufficient to abrogate the states' eleventh amendment immunity. As Justice Marshall structured the question, abrogation concerns a two-step inquiry:

(1) did Congress . . . effectively lift the State's protective veil of sovereign immunity; and (2) even if Congress did lift the State's general immunity, is the exercise of federal judicial power

barred in the context of this case in light of Art. III and the Eleventh Amendment?

Employees, 411 U.S. at 287-88 (Marshall, J., concurring in the result); see also Edelman, 415 U.S. at 672 (inquiring into "threshold fact of congressional authorization"); cf. In re McVey Trucking, 812 F.2d 311, 314 (7th Cir. 1987) (reversing the order of this two-step inquiry), petition for cert. filed, 56 U.S.L.W. 3028 (U.S. July 28, 1987). We therefore turn to the issue of Congress' power to allow citizen suits against the states pursuant to CERCLA, despite the eleventh amendment's limitation on Article III federal jurisdiction.⁵

⁵In Union Gas I, we first decided the statutory issue of congressional intent to abrogate. Having found no such intent, we did not need to reach

(FOOTNOTE CONTINUED ON NEXT PAGE)

The Commonwealth and amici argue that only certain types of exercise of congressional power may abrogate the eleventh amendment, and that the Constitution does not grant Congress the power to create an exception to the eleventh amendment in CERCLA. They argue that Congress may only directly abrogate the eleventh amendment when it acts pursuant to constitutional amendments passed after the eleventh. The Commonwealth and amici argue that, "because of the unique character of the Fourteenth Amendment, Congress may, through an unequivocal expression of its intent, subject an unconsenting state to a private suit in

(FOOTNOTE CONTINUED)

the constitutional issue. See Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (avoiding unnecessary constitutional issues); Siler v. Louisville & Nashville R.R., 213 U.S. 175, 193 (1909) (same).

federal court when seeking to enforce the Fourteenth Amendment." Brief of Amici at 9. According to this reasoning, the thirteenth, nineteenth, and twenty-fourth amendments would also allow Congress to limit the eleventh amendment because they (1) were ratified with an awareness of the eleventh amendment, (2) restrict the powers of states, and (3) grant authority to Congress to enact enforcing legislation.

We fully agree with the contention that Congress may override the eleventh amendment when acting pursuant to the powers enumerated above. We disagree, however, with the argument that congressional power to abrogate the eleventh amendment is limited only to those powers granted by the Constitution to Congress after the ratification of the eleventh amendment. Our reasoning is set forth below.

The Supreme Court has explicitly recognized that the fourteenth amendment grants Congress the power to subject states to suit in federal court notwithstanding the limitations of the eleventh amendment. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). Congress enacted CERCLA, however, pursuant to its Article I commerce clause power, see Hodel v. Virginia Surface Mining and Reclamation Association, 452 U.S. 264, 282 (1981); Wickland Oil Terminals v. Asarco, Inc., 654 F.Supp. 955, 957 (N.D. Cal. 1987), not its power under section five of the fourteenth amendment. We must therefore decide whether Congress may subject states to private suits in federal court when acting pursuant to its Article I commerce clause powers. This question has never been directly answered by the Supreme Court, which has chosen either

to expressly reserve the question, see County of Oneida, New York v. Oneida Indian Nation of New York State, 470 U.S. 226, 252, (1985), or to "assume, without deciding or intimating a view of the question, that the authority of Congress to subject consenting States to suit in federal court is not confined to § 5 of the Fourteenth Amendment." Welch, 107 S.Ct. at 2946. Our analysis of Congress' authority to subject states to suit under Article I requires an examination of the significance of distinctions between Article I and the fourteenth amendment, the history and language of the eleventh amendment, and the inherent protections offered to state sovereignty in the constitutional framework.

A. Article I and the Fourteenth Amendment: Must We Read the Constitution on a Timeline?

As a threshold matter, we disagree with Appellee's submission that only the amendments following the eleventh may override it. This reasoning would require that we read the Constitution on a timeline, a proposition we reject. Rather, we believe that we must interpret every provision in the Constitution in the light of the entire document. As the Supreme Court recognized long ago,

[t]he Constitution of the United States, with the several amendments thereof, must be regarded as one instrument, all of whose provisions are to be deemed of equal validity. It would, indeed, be most unfortunate if the immunity of the individual states from suits by citizens of other states, provided for in the

Eleventh Amendment, were to be interpreted as nullifying those other provisions which confer power on Congress to regulate commerce among the several states, which forbid the states from entering into any treaty, alliance or confederation, from passing any bill of attainder, ex post facto law or law impairing the obligation of contracts . . . -- all of which provisions existed before the adoption of the Eleventh Amendment, which shall exist, and which would be nullified and made of no effect, if the judicial power of the United States could not be invoked to protect citizens affected by the passage of state laws disregarding these constitutional limitations.

Prout v. Starr, 188 U.S. 537, 543 (1903); accord Richardson v. Ramirez, 418 U.S. 24, 42-43 (1974). In Billings v. United States, 232 U.S. 261, 282 (1914), the Court further recognized that "the Constitution is not self-destructive. In other words, that the powers which it confers on the one hand it does not immediately take away on the other"

Thus, even though the fourteenth amendment gives Congress the power to create causes of action that would subject a state to private suits in federal court, "[t]he fact that the Fourteenth Amendment was enacted after the Eleventh Amendment does not abrogate the latter in cases involving the former. The two amendments must be interpreted in light of each other." Townsend v. Edelman, 518 F.2d 116, 120 (7th Cir. 1975). Similarly, the Court of Appeals for the Seventh Circuit in McVey Trucking refused to accept the notion that the fourteenth amendment "repealed" the eleventh and hence rejected the premise that only post-fourteenth amendment congressional powers could serve as the basis for legislation to abrogate the amendment. 812 F.2d at 316. We, too, reject the argument that Congress may override the eleventh amendment only

under authority granted after the enactment of the eleventh amendment.

Although we recognize that Congress must act under a plenary grant of constitutional authority to abrogate the eleventh amendment, see McVey Trucking, 812 F.2d 320 (7th Cir. 1987) (citing Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985)), we disagree with the appellant's contention that the fourteenth amendment's grant of plenary powers to Congress is unique and thus distinguishable from Congress' plenary power to regulate interstate commerce as granted in Article I. In this matter we are persuaded by the reasoning of McVey Trucking, where the Court examined possible distinctions between the fourteenth amendment and Article I for purposes of eleventh amendment abrogation and found them untenable.

In a thorough, scholarly opinion, authored by Judge Flaum, McVey Trucking reviewed and rejected the notion that the fourteenth amendment represents an "ultra-plenary" grant of authority.⁶ 812 F.2d at 319-23. McVey Trucking also rejected the notion that "Fitzpatrick could be read to suggest that each grant of power contained in the Constitution must be linked to a provision that, by [its] own terms' limits state authority in order for Congress, acting under that power, to create a cause of action for money damages against a state." 812 F.2d at 320 (citation omitted). The court observed that any plenary grant of power

⁶Judge Flaum's opinion in McVey carefully examined the extent to which the eleventh amendment limits Congress' Article I powers and held that Congress may make states amenable to suit in federal court for money damages under the bankruptcy clause. U.S. Const. Art. I, § 8, cl. 4.

to Congress is a limitation on state authority, and that the two provisions were not distinguishable on the basis of the explicit reference to states in the fourteenth amendment. *Id.* at 321. We are convinced, as well, that the power of these two sections of the Constitution does not vary for the purposes of abrogating state immunity from suit.

We acknowledge that the Court has drawn a distinction between Article I and the fourteenth amendment in divining congressional intent.⁷ *Hutto v. Finney* suggests something of a sliding

⁷Indeed, in *Union Gas I*, we concluded that where the statutory language is lacking, the Supreme Court required "virtually overwhelming" evidence from the legislative history of congressional intent to abrogate. 792 F.2d at 378.

scale for the clarity of congressional expression of intent, depending on the source of the congressional power under which Congress is legislating. Where Congress acts pursuant to its Article I power, which "has grown to vast proportions in its applications," *Employees*, 411 U.S. at 285 (FLSA regulations), it must do so in "unmistakable language in the statute itself." *Atascadero*, 473 U.S. at 243. However, when Congress legislates pursuant to § 5 of the fourteenth amendment, "whose other sections by their own terms embody limitations on state authority," *Fitzpatrick*, 427 U.S. at 456, the standard for demonstrating congressional intent is less strict and may be supported by the legislative history alone. *Hutto v. Finney*, 437 U.S. at 698 & n.31. Although a clearer expression of intent is required for an

Article I enactment, the requirement is not because the fourteenth amendment is a stronger grant of power. Rather, congressional intent to abrogate is easier to infer from a fourteenth amendment enactment.

B. The Language and History of the Eleventh Amendment

In addressing the scope of congressional power to abrogate, an understanding of the purpose and scope of the amendment is required. Therefore, a brief review of the history of the eleventh amendment is essential.

The eleventh amendment was a reaction to the Supreme Court's decision in *Chisolm v. Georgia*, 2 U.S. [2 Dall.] 419 (1793), in which the Court construed Article III's extension of the judicial power over controversies "between a State

and Citizens of another State" to make states amenable to suit in federal court by citizens of another state.⁸

⁸Scholars have argued the eleventh amendment was only intended to reach diversity jurisdiction, not federal question jurisdiction as is involved here. The point out that the problem with the *Chisolm* decision was not its abrogation of state immunity in general, but its abrogation in a diversity setting in which Georgia law would not have immunized the state from suit. As Professor Amar points out in Of Sovereignty and Federalism, 96 Yale L.J. 1425, 1467-72 (1987), the action in *Chisolm* was for *assumpsit* -- a state law cause of action. Historically, therefore, it may be wiser to view the eleventh amendment as a response to an *Erie*-type problem, rather than a problem of state sovereignty. This interpretation also explains what some have characterized as the inadvertent exclusion in the amendment of suit between state and citizens of that state. Because this category of suits is immune from federal diversity, and immune to a *Chisolm*-like incursion, the framers did not include it in the amendment. See *id.* at 1474.

(FOOTNOTE CONTINUED ON NEXT PAGE)

See Pennhurst II, 465 U.S. at 91-98; Petty, 359 U.S. at 276; McVey Trucking, 812 F.2d at 317. In swift response to this construction of Article III, Congress and the States passed the eleventh amendment to provide: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United

(FOOTNOTE CONTINUED)

We need not address the historical argument that the eleventh amendment was never intended to reach federal question jurisdiction. It is sufficient for us to note that the eleventh amendment was intended as a limitation on judicial, not congressional, power. Amar also notes that the language of the eleventh amendment stating that "the judicial power shall not be construed to" indicates that its drafters intended to restrict judicial, not congressional abrogation of sovereign immunity. Amar points out that an earlier draft of the amendment used "shall not extend," but that such language might have prevented even affirmative jurisdictional grants. *Id.* at 1482. This argument supports our conclusion.

States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI.

In light of the circumstances surrounding the passage of the eleventh amendment, this language has been construed to mean that courts cannot, pursuant to their Article III powers, subject states to suit. Thus, language of the amendment does not, nor was it ever intended to, limit Congress' Article I powers; rather, it limits the courts' power to construe the grant of judicial power in Article III to abrogate the state's presumptive immunity from diversity suits. See Tribe, Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism, 89 Harv. L. Rev. 682, 693-99 (1976).

Courts have broadly extended the principles of state sovereign immunity that underlie the eleventh amendment and have applied them to cases outside the technical language of the amendment. For example, the eleventh amendment does not, by its terms, limit all Article III jurisdiction. The words of the amendment seem to limit only the diversity jurisdiction over disputes "between a State and Citizens of another State." See McVey Trucking, 812 F.2d at 317-19; Fletcher, A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction, 35 Stan. L.Rev. 1033 (1983). However, in Hans v. Louisiana, 134 U.S. 1 (1890), the Court held that the eleventh amendment barred suits based on federal

question jurisdiction. That case provides an example of the breadth of application. Although the eleventh amendment does not on its face address federal question jurisdiction, the Supreme Court has instructed that "we cannot rest with a mere literal application . . . or assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against non-consenting States. Behind the words of the constitutional provisions are postulates which limit and control." Principality of Monaco v. Mississippi, 292 U.S. 313, 322 (1934).

The theory of sovereign immunity, which undergirds the eleventh amendment, has thus led the Supreme Court to fashion a presumption that a congressional enactment conferring general federal question jurisdiction

does not operate to subject states to suit. See *Hans*, 134 U.S. at 13; *McVey Trucking*, 812 F.2d at 318 ("as a sovereign, a state is presumptively immune from suit in a federal court even if the cause of action arises under federal law"). As we have discussed at length in Part I, only Congress' clearly articulated decision to subject the states to suits by private individuals in federal court operates to rebut this presumption. The presumption of immunity and the high threshold for its rebuttal animate the notion of sovereignty that underlies the eleventh amendment. Given this strong presumption, where Congress has clearly articulated its desire to abrogate the eleventh amendment, any further expansion of the eleventh amendment is unwarranted.

In sum, the language and history of the eleventh amendment provide substantial checks on the ability of the federal government to subject states to suit in federal court. First, the Supreme Court has extended the reach of the amendment, granting state immunity from suits by citizens of the same state, and from suits involving many federal questions. Second, Congress may only override the eleventh amendment when acting under a grant of plenary authority; the presumption of immunity is high, however, and the congressional exercise of a grant of plenary authority alone is not enough. Thus, where the Court has recognized congressional power to override the amendment, as in section 5 of the fourteenth amendment, the Court has required

that Congress speak with unmistakable clarity.

Such limitations on abrogation of the eleventh amendment protect state sovereignty consistent with the amendment's purposes, and limit the reach of congressional authority to override under Article I. Moreover, as we discuss in the following section, implicit in the constitutional plan are limitations on Congress' power and incentive to abrogate state sovereign immunity under Article I. As the final phase of our analysis of the question of congressional power to abrogate eleventh amendment protection under the aegis of Article I, we now consider these limitations within the framework of the constitutional design.

C. The Constitutional Design

1. Checks and Balances

The eleventh amendment reflects our system of checks and balances by limiting the power to abrogate sovereign immunity to the freely elected legislative branch. This design permits the legislative branch limited power to abrogate state immunity pursuant to grants of constitutional authority, while preventing the judiciary from independently using Article III to do the same. By adopting the eleventh amendment, Congress and the states expressed their desire to limit judicial action. Congress, however, never meant to curtail its own power to limit sovereign immunity where appropriate. Indeed, holding that states maintain their immunity in the face of national

control "is inconsistent with the constitutional plan." Tribe, 89 Harv. L. Rev. at 694-95 (footnotes omitted).

This dichotomy between the power of the judiciary and the Congress is particularly significant in the area of commerce clause regulation. In this regard, it is pertinent that CERCLA is a commerce clause regulation. As Justice Brennan has stated in dissent, "judicial interpretation of our Constitution settled since the time of Mr. Chief Justice Marshall . . . postulate[s] that the Constitution contemplates that restraints upon exercise by Congress of its plenary commerce power lie in the political process and not in the judicial process." National League of Cities v. Usery, 426 U.S. 833, 857 (1976) (Brennan, J., dissenting). Justice Brennan's dissenting position,

which mirrors the majority position in the case overruled by Usery, Maryland v. Wirtz, 392 U.S. 183 (1968), has again become to be the law of the land. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 550-52 (1985). In contrast, our system of checks and balances dictates that the unelected federal judiciary, isolated from the political pressures that inhere in the need for reelection, must be constrained by such a constitutional restriction from abrogation of sovereign immunity.

In addition, the requirement of a clear statement before Congress may override the eleventh amendment assures that congressional intent will be followed, see Peel, 600 F.2d at 1081, and serves to check judicial interpretation of statutes. See Welch, 107

S.Ct. at 2946; cf. American Fire & Casualty Co. v. Finn, 341 U.S. 6, 17 (1951) ("The jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation"). To extend the eleventh amendment to render nugatory a clear expression of congressional intent to abrogate state immunity would thwart the Constitution's plan by ignoring the representative nature of Congress.

The scope of Congress' power to abrogate the eleventh amendment under Article I is also limited by states' representation in Congress. The Congress, comprised wholly of delegates chosen by states (through their subdivisions), will respond to state needs and therefore does not require the

eleventh amendment limitation. The Supreme Court in Garcia, 469 U.S. at 550, observed that "the principal means chosen by the Framers to ensure the role of the States in the Federal system lies in the structure of the Federal Government itself." And, as Professor Tribe notes, "it has generally been recognized that the states are represented in Congress and that Congress will be attentive to concerns of state governments as separate sovereigns." Tribe, 89 Harv. L.Rev. at 695 (footnote omitted).

2. Federalism

Extending the eleventh amendment to prohibit congressional power to abrogate under Article I would ignore the states' representation in Congress

and their consent to diminished power implicit in their acceptance of the Constitution. The Supreme Court itself has recognized that in some situations states have given up their immunity in the constitutional plan: "States of the Union still possess[] attributes of sovereignty, shall be immune from suits, without their consent, save where there has been 'a surrender of this immunity in the plan of the convention.'" Principality of Monaco, 292 U.S. at 322-23 (quoting The Federalist No. 81 (A. Hamilton))(footnote omitted).

Thus, just as Congress acting pursuant to section 5 of the fourteenth amendment is "exercising legislative authority that is plenary within the terms of the constitutional grant . . . under one section of a constitutional amendment whose other sections by their

own terms embody limitations on state authority," Fitzpatrick, 427 U.S. at 456, so Congress acts under its Article I powers to "regulate Commerce . . . among the several States," § 8, cl. 3, and "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." § 8, cl. 18. By assenting to federal authority to regulate commerce, the states necessarily surrendered their sovereignty over that area. "There was not a State in the Union, in which there did not, at that time, exist a variety of commercial regulations; . . . By common consent, those laws dropped lifeless from their statute books, for want of sustaining power that had been

relinquished to Congress." Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 11, 226 (1824).⁹

⁹As one commentator has noted,

The commerce clause comprises, however, not only the direct source of the most important peace-time powers of the National Government; it is also, except for the due process of law clause of Amendment XIV, the most important basis for judicial review in limitation of State power. The latter, or restrictive, operation of the clause was, in fact, long the more important one from the point of view of Constitutional Law. Of the approximately 1400 cases which reached the Supreme Court under the clause prior to 1900, the overwhelming proportion stemmed from State legislation.

E. Corwin, The Constitution and What it Means Today 67 (14th ed. 1978). Hence, even where Congress has not acted, the

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Congress' authority over interstate commerce stems from the plenary powers that have been granted to our national legislature and represents a displacement of state sovereignty. See Garcia, 469 U.S. at 548-49 (citing both Art. I, § 8 and the fourteenth amendment as "sharp contraction[s] of state sovereignty"). Hence, every federal appellate court to have addressed the question has found that Congress may subject the states to suit in federal court, the eleventh amendment

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Commerce Clause restrains state actions that affect interstate commerce in a discriminatory manner. See Philadelphia v. New Jersey, 437 U.S. 617, 623-24 (1978).

notwithstanding, when acting pursuant to its plenary powers. See McVey Trucking, 812 F.2d at 328; County of Monroe v. Florida, 678 F.2d 1124, 1128-35 (2d Cir. 1982) (congressional power over extradition, Art. IV, § 2, cl. 2) cert. denied, 459 U.S. 1104 (1983); Peel v. Florida Department of Transportation, 600 F.2d 1070, 1074-82 (5th Cir. 1979) (war powers clause, Art. I, § 8, cl. 11-13); Mills Music, Inc. v. Arizona, 591 F.2d 1278, 1285 (9th Cir. 1979) (copyright and patent clause, Art I, § 8, cl. 8); Jennings v. Illinois Office of Educ., 589 F.2d 935, 937-44 (7th Cir.) (war powers clauses), cert. denied, 441 U.S. 967 (1979). We agree.

3. Conclusion

The constitutional scheme of checks and balances places powerful constraints, both structural and political, upon the abrogation of the states' eleventh amendment immunity. However, the participation of the states in our federal scheme has resulted in a relinquishment of state authority in the commerce area. We conclude that a constitutional grant of plenary authority to Congress, when stated with unmistakable clarity, as here, is sufficient to support legislation that subjects the states to suit in federal court. We, therefore, hold that when acting under the commerce clause to enact CERCLA and amend it with SARA,

Congress possessed the power to abrogate the eleventh amendment.¹⁰

IV. Retroactivity

Having found that Congress, in enacting CERCLA and SARA, (1) explicitly intended to provide for suits by a citizen against a state, and (2) had the constitutional power to so abrogate the eleventh amendment for Superfund suits, we need only decide one remaining issue. SARA's grant of jurisdiction was not effected until the amendment became law on October 17, 1986, long after the

¹⁰Because we find that Congress lifted the states' eleventh amendment immunity at least when it enacted SARA, but see infra n. 11, we need not distinguish between court's powers to grant retroactive or prospective relief. In the absence of an eleventh amendment problem, either or both may be appropriate. See Fitzpatrick, 427 U.S. at 456-57; Peel, 600 F.2d at 1081-82.

Brodhead Creek excavation, the initiation of Union Gas' third-party complaint, and the initial appeal to us. We must therefore inquire whether SARA's jurisdictional grant controls the instant dispute.

Generally speaking, we must account for a change of law on appeal. See Poleto v. Conrail, Nos. 86-5249 & 86-5250, slip op. at 25-27 (3d Cir. 1987). We have constantly reaffirmed our obligation to "apply the law in effect when [we] resolve[] an appeal. The court will apply a statute passed after decision in the trial court if that law is a valid enactment." Danbury, Inc. v. Olive, 820 F.2d 618, 625 (3d Cir. 1987) (citing Thorpe v. Housing Authority, 393 U.S. 268, 281-82 (1969)). As Chief Justice Marshall explained almost two centuries ago,

if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional, . . . I know of no court which can contest its obligation.

United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801).

The Supreme Court has clearly held that this rule applies to statutory changes that contract the jurisdiction of the federal courts. See, e.g., Bruner v. United States, 343 U.S. 112, 116-17 ("when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law"). It has held with equally clarity that, when a law expands the jurisdiction of the federal courts, that expansion governs cases on

direct appeal. See, e.g., Andrus v. Charlestone Stone Products Co., 436 U.S. 604, 607-08 n.6 (1978); United States v. Alabama, 362 U.S. 602, 604 (1960) (per curiam). Thus, "where Congress has expanded the jurisdiction of the courts in response to a perceived gap in a statutory judicial scheme," we are not free to ignore that jurisdictional grant when considering cases on direct appeal. Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1084 (1st Cir. 1986); accord Sandefur v. Cherry, 718 F.2d 682, 684-85 (1983) ("it would be wasteful to both the parties and the courts to dismiss this appeal for lack of federal jurisdiction, for it could be at once refiled").¹¹

¹¹One circuit has seemingly held that Congress must have intended a jurisdictional grant to apply to cases (FOOTNOTE CONTINUED ON NEXT PAGE)

Because its expansion of jurisdiction is treated like all other changes of law on appeal, SARA's amendments to CERCLA control cases pending

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pending on direct appeal. See Carlton v. BAWW, Inc., 751 F.2d 781, 787 n.6 (5th Cir. 1985) (holding that Congress intended amendments to bankruptcy jurisdiction to apply to pending cases). We note that in SARA, Congress intended the amendments to the relevant sections of CERCLA "to clarify that if the unit of government caused or contributed to the release or threatened release in question, then such unit is subject to the provisions of CERCLA, both procedurally and substantively as any non-governmental entity, including liability under section 107 and contribution under section 113." H.R. Conf. Rep. No. 962, 99th Cong., 2d Sess., reprinted in 1986 U.S. Code Cong. & Admin. News 3276, 3278-79 (emphasis added). Because Congress intended SARA to serve as a clarification of existing law, Congress apparently intended that CERCLA, even before SARA, would abrogate the states' eleventh amendment immunity. We may therefore apply to pending cases, as well as those initiated after SARA, Congress' abrogation of the eleventh amendment.

on direct appeal. We therefore find that the Commonwealth of Pennsylvania is amenable to the suit brought by Union Gas in the instant action.

V. CONCLUSION

Congress, in enacting CERCLA and amending it with SARA, provided for suits in clear and explicit statutory language evidence of its intent to allow Superfund suits by a citizen against a state. Moreover, Article I grants Congress the constitutional power to so abrogate the eleventh amendment for Superfund suits. Insofar as SARA represents a change in the law, it applies to suits pending on direct appeal. The Commonwealth of Pennsylvania thus cannot interpose the eleventh amendment to immunize it from suit by

Union Gas pursuant to CERCLA. We therefore will reverse the judgment of the district court and remand the case for further proceedings.

A True Copy:

Teste:

Clerk of the United States Court
of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 85-1177

UNITED STATES OF AMERICA.

v.

UNION GAS COMPANY

v.

COMMONWEALTH OF PENNSYLVANIA
and THE BOROUGH OF STROUDSBURG

UNION GAS COMPANY,

Appellant

On Appeal from the United States
District Court for the
Eastern District of Pennsylvania
(D.C. Civ. No. 83-2456)

Argued January 7, 1986

Before: WEIS, HIGGINBOTHAM BECKER
Circuit Judges

(Filed JUNE 10, 1986)

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OPINION OF THE COURT

BECKER, Circuit Judge

This appeal presents a single question: whether the eleventh amendment bars defendant-third party plaintiff

Union Gas Company from suing the state of Pennsylvania for monetary damages in an action arising under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund), 42 U.S.C. § 9601 *et seq.* (1982). The district court held that the eleventh amendment was a bar to suit and dismissed Union Gas' claim against the state. We affirm.

I. THE FACTS

The relevant facts can be summarized quite briefly. Predecessors of Union Gas Company owned and operated a carburetted water gas plant proximate to Brodhead Creek in Stroudsburg, Pennsylvania between 1890 and 1948, after which the plant was dismantled. In 1953 and 1970, Union Gas sold part of its land near the creek to Pennsylvania

Power and Light Company, which in turn granted easements over the land to the Borough of Stroudsburg. In 1955, due to flooding, the state and the borough, together with the Army Corps of Engineers, dug levees, erected dikes, narrowed and deepened the creek, and redirected its flow. In early 1980, the borough assigned its easements to the state.

On October 7, 1980, the state was excavating at the creek when it struck a large deposit of coal tar that began to seep into Brodhead Creek. Altered to the coal tar seepage, the Environmental Protection Agency (EPA) asserted that the coal tar was a hazardous substance and ordered the site to be cleaned up.¹ The state of Pennsylvania

¹Brodhead Creek thus had the dubious distinction of being the first Superfund site in the nation.

jointly with the federal government undertook, *inter alia*, to dredge the back channel of Broadhead Creek, install a slurry wall to prevent further coal tar seepage, and clean up the coal tar that had already seeped into the water. The federal government reimbursed the state for all its costs, expending approximately \$720,000 in total.

II. INSTITUTION OF THIS SUIT

The United States brought suit in the district court for the Eastern District of Pennsylvania against Union Gas under CERCLA §§ 104, 107 (42 U.S.C. §§ 9604, 9607) for recoupment of costs of \$450,000 incurred in cleaning up the spill at Broadhead Creek.² The United

²The United States also sought damages of \$270,000 under the Federal Water Pollution Control Act, 33 U.S.C.

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States claimed that the coal tar had been deposited into the ground near Broadhead Creek by Union Gas and its predecessors, as a by-product of their carburetted water gas processing, and that Union Gas was consequently liable for the clean up costs. Union Gas answered the complaint, denying any liability, and filed a third-party complaint pursuant to Fed. R.Civ. P. 14, naming Pennsylvania and the Borough of Stroudsburg as third-party defendants. Union Gas alleged that the state and its political subdivision had "negligently caused, or contributed to the discharge

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§§ 1321(b)(3) and (f)(2)(1982). Union Gas did not file a third-party claim with respect to these damages, however, and so they are irrelevant to this appeal.

of coal tar into Broadhead Creek" by their recent excavation and earlier construction of dikes and levees, and therefore that they should pay for the clean up.

The state, believing that the eleventh amendment barred Union Gas' suit against it, responded with motions to dismiss pursuant to Fed. R.Civ. P. 12(b)(1) and 12(b)(6).³ The district

³Independent local political subdivisions are generally not entitled to immunity, although they may, in some circumstances, be considered arms of the state and thus derive the state's eleventh amendment immunity. See Laje v. R.E. Thomason General Hospital, 665 F.2d 724, 727 (5th Cir. 1982). Because Stroudsburg did not raise an eleventh amendment defense below, and did not appear on this appeal, we reach no decision as to whether the eleventh amendment immunity would extend to Stroudsburg.

court granted the state's motion. United States v. Union Gas Co., 575 F.Supp. 949 (E.D. Pa. 1983). Shortly thereafter, the United States filed an amended complaint, virtually identical to its original complaint but with revised damage figures alleging that the United States had spent \$1,400,000 on the clean-up, of which \$720,000 was collectible from Union Gas under CERCLA. Union Gas answered and filed an amended third-party claim against the state and borough. The state again moved to dismiss, and the court granted the state's motion "for the reasons set forth in [575 F.Supp. 949]."

Approximately five months after the court's dismissal of Union Gas' amended third-party claim, the court dismissed the federal government's action against Union Gas pursuant to

rule 23(b) of the Local Rules of Civil Procedure of the Eastern District of Pennsylvania on the understanding that the United States and Union Gas had reached a settlement. Union Gas then appealed, citing as error the district court's denial of its motion to join the state as a party.

The issue before us involves a question of law, and therefore our review is plenary.

III. ABROGATION OF ELEVENTH AMENDMENT IMMUNITY

The eleventh amendment states that:

The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citzens or Subjects of any Foreign State.

U.S. Const. amend. XI. Although not apparent on its face, the eleventh amendment has been interpreted as a grant of sovereign immunity to the states in federal court.⁴ Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984); Edelman v. Jordan, 415 U.S. 651 (1974); Hans v. Louisiana, 134 U.S. 1 (1890). But see Green v. Mansour, ____ U.S. ___, 106 S.Ct. 423, 431 (1985) (Brennan, J., dissenting) ("the Amendment was intended simply to remove federal court jurisdiction over suits against a State where the basis for jurisdiction was that the plaintiff was a citizen of another State or an alien"); Atascadero State Hospital v. Scanlon, 105 S.Ct. 3142

⁴The amendment does not speak about the amenability of states to suits in state court. When we speak in this opinion of "states' sovereign immunity," we refer only to their immunity from suit in federal court derived from the eleventh amendment.

3156-78 (1985) (Brennan, J., dissenting) (detailing history of the amendment to support the same conclusion): Gibbons, The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation, 83 Colum. L.Rev. 1889 (1983)(same); Shapiro, Wrong Turns: The Eleventh Amendment and the Pennhurst Case, 98 Harv. L.Rev. 61, 67-71 (1984). The immunity can be avoided in only two ways: (a) Congress can abrogate it by providing through statute for suits against states, or (b) states can waive their sovereign immunity and consent to be sued. We are concerned here only with whether CERCLA abrogated Pennsylvania's immunity.⁵

⁵Union Gas also claims that Pennsylvania waived its immunity, but this claim is patently without merit and

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the district court did not even consider it. United States v. Union Gas, supra, 575 Supp. at 950. Union Gas alleges that Pennsylvania consented to suit by (a) owning and operating a site where hazardous wastes were stored, and (b) participating with the federal government in the clean-up effort. Leaving aside the fact that Pennsylvania most likely did not know of the coal tar in the bed of Brodhead Creek and so cannot be said to have consented to anything by its purchases of property, Pennsylvania's purchase and clean-up efforts are not sufficiently emphatic to constitute a constructive waiver of its constitutional right. It would be unreasonable to infer from Pennsylvania's actions that it had waived one of its most important and longstanding constitutional rights. Cf. Edleman v. Jordan, 415 U.S. 651, 673 (1974) ("Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights, and we see no place for it here."); Great Northern Life Insurance Co. v. Read, 322 U.S. 47, 54 (1944); Murray v. Wilson Distilling Co., 213 U.S. 151, 171 (1909). See generally Tribe, Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism, 89 Harv. L. Rev. 682, 695 (1976)(suggesting

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The Supreme Court has noted the eleventh amendment's importance in maintaining the balance of power between state and federal interests. See, e.g., Atascadero, supra, 105 S.Ct. at 3147-48;

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that courts require a definitive action by states before finding waiver of sovereign immunity).

Moreover, there is a bootstrap quality to Union Gas' argument that merely by aiding in the clean-up effort Pennsylvania waived its immunity. Stripped to its essence, Union Gas is arguing that waiver is a condition precedent to participation in the clean-up. But because participation is expressly allowed by statute, 42 U.S.C. § 9604(d)(1), the imposition of the condition must be found in CERCLA itself. Thus Union Gas' waiver argument depends upon its interpretation of CERCLA -- i.e., it is an argument of abrogation, not waiver. As such the argument is superfluous, for if the abrogation argument works, then the waiver argument is irrelevant, and if the abrogation argument fails, then so does the waiver argument.

Pennhurst, supra, 465 U.S. at 99. Because this balance is central to our system of federalism, the Court has been reluctant to infer abrogation of the eleventh amendment by a federal statute that could be otherwise interpreted. In Pennhurst, for example, the Court required "an unequivocal expression of congressional intent to 'overturn the constitutionally guaranteed immunity of the several States.'" 465 U.S. at 99 (quoting Quern v. Jordan, 440 U.S. 332, 342 (1979)). In the recent Atascadero case, the Court held that "Congress must express its intention to abrogate the Eleventh Amendment in unmistakable language in the statute itself." 105 S.Ct. at 3148 (footnote omitted). See also Edelman v. Jordan, 415 U.S. 651 (1974).

Even a statute whose natural reading would allow for suits against the state -- indeed a statute for which any other reading may be awkward -- may not suffice. The Court has insisted that the statute, when read literally, not merely allow suits against the state, but that it do so with such specificity that it is clear that Congress consciously and directly focused on the issue of state sovereign immunity and chose to abrogate it.⁶ Cf. Hutto v. Finney, 437 U.S. 678, 706 (1978)(Powell, J., concurring in part and dissenting in part)(“The Court should be ‘hesitant to presume congressional awareness’ of Eleventh Amendment consequences of a

statute that does not make express provision for monetary recovery against the States.”)(quoting SEC v. Sloan, 436 U.S. 103, 121 (1978)).⁷

Two cases in particular illustrate the Court’s insistence on overwhelming evidence of congressional intent. In Employees of Dept. of Pub. Health & Welfare v. Missouri Dept. of Pub. Health & Welfare, 411 U.S. 279 (1972), employees of a state hospital sued for overtime pay that they claim they were entitled to under the Fair Labor Standards Act (FLSA). One section of the FLSA gave employees whose employers were covered by the FLSA a right of action against the employers to enforce the FLSA’s terms. Another section

⁶Because abrogation requires a showing of “plain intent” rather than merely “plain meaning,” the dissent’s focus on CERCLA’s “plain meaning” misses the mark.

⁷Justice Powell wrote for the majority in Atascadero discussed *infra*.

had recently been amended explicitly to include state hospitals in the class of employers regulated by the FLSA. Although these two sections appeared to allow for a suit against state governments in federal court, the Court found no abrogation of the State's immunity because there was no evidence of congressional intent on the specific issue of sovereign immunity. *Id.* at 284-85. It was also significant, the Court noted, that there was plausible interpretation of the amended section that did not require abrogation of the eleventh amendment, according to which the section empowered the Secretary of Labor to sue the state on the workers' behalf. *Id.* at 285-86.

The second illustrative case, *Atascadero*, *supra*, involved § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1982), which conferred a right of action upon handicapped people who were discriminated against by "any recipient of federal assistance." A plaintiff sought damages from a state hospital that received federal financial assistance, but the Court held that the inclusive language of the Rehabilitation Act notwithstanding, the eleventh amendment barred the suit:

The statute thus provides remedies for violations of § 504 by "any recipient of federal assistance." There is no claim here that the State of California is not a recipient of federal aid under the statute. But given their constitutional role, the States are not like any other class of recipients of federal aid.

A general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment. When Congress chooses to subject the States to federal jurisdiction, it must do so specifically.

105 S.Ct. at 3149 (emphasis added)
(footnote omitted).

One other case deserves special mention. In Hutto v. Finney, 437 U.S. 678 (1978), the Supreme Court held that the Civil Rights Attorney's Fees Awards Act 42 U.S.C. § 1988 (1982), abrogated the eleventh amendment, thus permitting successful claimants against the state to receive attorneys' fees, even though the relevant statutory language was quite general and referred to neither the eleventh amendment nor suits against states. The Court relied on several factors, most significantly § 1988's extensive legislative history. The Court observed that both the House and

Senate Reports explicitly endorsed the payment of attorneys' fees by states.⁸ see Hutto, 437 U.S. at 694, and that two attempts to amend the Act to immunize state and local governments from awards had been defeated. *Id.* The Court concluded that this evidence provided the requisite "formal indication of Congress[ional] intent to abrogate States' Eleventh Amendment immunity," *id.* at 697 n.27, and that it would be irresponsible to refuse to read § 1988 as an abrogation of immunity, *id.* at

⁸The Senate Report said that "[i]t is intended that the attorneys' fees, like other items of costs, will be collected either directly from the official. . . . or from the State." S. Rep. No. 94-1011, p. 5 (1976) (footnotes omitted), (1976) U.S. CODE CONG. & AD. NEWS 5908, 5913 (quoted in Hutto, 437 U.S. at 694). The House Report was even more direct: "Of course, the 11th Amendment is not a bar to the awarding of counsel fees against state governments." H.R. Rep. No. 94-1558, p. 7 n. 14 (1976) (quoted in Hutto, 437 U.S. at 694).

694. The Court was further influenced by the fact that because § 1988 "primarily applies to laws passed specifically to restrain state action," allowing the eleventh amendment to bar § 1988 suits would rob § 1988 of much of its force. *Id.* at 693-94. Finally, the Court noted the special nature of attorney's fees as costs of litigation, and thus within the traditional power and discretion of the judiciary. *Id.* at 696, 697 n.27.

There is some question whether *Hutto* stands in the wake of *Atascadero*'s explicit holding that "unmistakable language in the statute itself" is the *sine qua non* of abrogation. The *Atascadero* Court did not overturn *Hutto*, however, and so we believe that it retains its precedential value. *Hutto* demonstrates that although a court may interpret a statute to abrogate states'

eleventh amendment immunity even in the absence of explicit statutory language to that effect, the evidence in favor of such an interpretation must be virtually overwhelming. This insistence on overwhelming evidence is only intensified by *Atascadero*.⁹

⁹In *Parden v. Terminal Ry. Co.*, 377 U.S. 184 (1964), the Supreme Court held that a state that ran a railroad for profit was liable to its employees under the Federal Employers' Liability Act although that act had no mention of the eleventh amendment and its legislative history was sparse. *Parden* would thus seem to imply a lesser standard of proof for abrogation than that required by *Hutto*, and Union Gas relies upon it. The reliance is misplaced, for *Parden* has been limited to instances in which the state is engaged in a for-profit enterprise. See *Employees*, *supra*, 411 U.S. at 285. Union Gas has not suggested that Pennsylvania was engaged in such an enterprise here, and therefore *Parden* would appear to be inapposite.

Moreover, as Professor Tribe noted in 1976, the philosophy underlying *Parden* shifted significantly in the years following it, making abrogation more difficult:

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In the decade between Parden and Edelman [v. Jordan, 415 U.S. 651 (1974)], the Supreme Court's stance on the eleventh amendment has significantly shifted. Parden would make states amendable to suit in federal court whenever they undertake an activity for which a private person could potentially be held liable under a valid federal law. The Parden majority thus posited no distinction between the states and other entities that might be regulated by federal legislation. Employees and Edelman, on the other hand, understand states to be distinguished from other entities by federalism considerations. For this reason, the amenability of states to suit must be specifically addressed by federal legislation, and Congress must make its intention to treat states like private parties unmistakably clear. This policy of clear statement had been rejected by the Parden majority, but . . . eventually prevailed.

Tribe, supra, at 690-91 (footnotes omitted). See also Welch v. State Dept. of Highways & Pub. Trans., 780 F.2d 1268, 1270-73 (5th Cir. 1986)(en banc)(discussing developments in the jurisprudence since Parden). The years since Professor Tribe wrote have only confirmed and deepened the change in attitude that he identified.

This brief review provides the background for our consideration of whether CERCLA may be interpreted to abrogate the eleventh amendment.

IV. CERCLA AND THE ELEVENTH AMENDMENT

CERCLA, Pub. L. No. 96-510, 94 Stat. 2767 (codified in 42 U.S.C. §§ 9601-15, 9631-36, 9641, 9651-53, 9654-56, 6911-11A, 6957, and various sections of titles 26, 33 and 49), was a bold effort to meet the threat to the public health and environment posed by inactive hazardous waste sites. See H.R. Rep. No. 1016, PT. I, 96th Cong., 2d Sess. (1980), reprinted in [1980] U.S. Code Cong. & Ad. News 6119: S. Rep. No. 838, 96th Cong., 2d Sess. (1980).¹⁰ We shall not canvass the full scope of

¹⁰The legislative history of CERCLA is exceedingly complicated because of the manner in which the bill

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that effort: we will instead review those provisions of CERCLA that are directly relevant to Union Gas' claim that CERCLA manifests Congress' intent to abrogate states' eleventh amendment immunity.

A. 42 U.S.C. § 9607 and the Definition of "Person"

CERCLA empowers the President, in coordination with the state or states in which there is a hazardous waste site emergency, to clean up the dangerous waste or take other steps necessary to

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was passed. Three bills in the Ninety-Sixth Congress contributed in some way to the legislation as finally enacted. H.R. 7020, 96th Cong., 2d Sess. (1980), H.R. 85 96th Cong., 1st Sess. (1979), and S. 1480, 96th Cong., 1st Sess. (1979). The legislative history is untangled and analyzed in Grad, A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980, 8 Colum. J. Env. L. 1 (1982).

prevent the danger from escalating. 42 U.S.C. § 9604. The liability section of CERCLA, 42 U.S.C. § 9607(a), allows those whose have incurred clean up costs to sue "any person" who owned or operated the waste site for all costs incurred in the removal effort. The definitional section of the statute, 42 U.S.C. § 9601, defines person as "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body." 42 U.S.C. § 9601[21][emphasis added].

Union Gas argues that 42 U.S.C. §§ 9607(a) and 9601 jointly meet the clear statement requirement enunciated by the Supreme Court. The argument is straightforward: (1) § 9607(a) says that

any person who owns or operates a hazardous waste site is liable for clean-up costs; (2) the state owns the land on Brodhead Creek where the hazardous waste is deposited; (3) § 9601 says that a state is a person for purposes of CERCLA; therefore, (4) the state is jointly liable for the costs of clean-up.

Although this argument is not without force, we cannot accept it. The statutory arrangement in this case is almost identical to that in Employees of Dept. of Pub. Health & Welfare v. Missouri Dept. of Pub. Health & Welfare, 411 U.S. 279 (1972). Here, as there, the suggestion that states might be sued is found in a provision separate from the one that creates the plaintiff's cause of action. The Employees Court found

that arrangement insufficient to satisfy the burden of abrogation. Because there is no suggestion in CERCLA's legislative history that the authors of these provisions intended them to make states liable for damages, cf. Hutto v. Finney, 437 U.S. 678 (1978), we are bound by Employees to find that the inclusion of "states" within the class of potential defendants is insufficient to abrogate Pennsylvania's immunity.¹¹

¹¹The dissent suggests that the "key distinction" between Employees and this case is that the inclusive language in the FLSA at issue in Employees was an amendment to the statute while there was no such "evolution" in CERCLA. Dissent Typescript at 6-7. A fair reading of Employees demonstrates, however, that it was not the fact that the statute had been amended that led the Court to its conclusion, but rather the absence of any clear indication of congressional intent to abrogate states' eleventh amendment immunity. See Employees, 411 U.S. at 283-85. There is no greater evidence of congressional intent in this case.

We would reach the same conclusion without the guidance of Employees, for there is evidence in CERCLA itself that § 9607(a) was not intended to abrogate states' sovereign immunity. The United States is included in the definition of person in § 9601 (21): therefore, if § 9607(a) were indeed an abrogation of states' sovereign immunity then that section would waive the United States' immunity as well. However, a separate CERCLA provision, § 9607(g) explicitly waives federal sovereign immunity.¹² This implies that § 9607(a) does not waive

1242 U.S.C. § 9607(g) states:

Each department, agency or instrumentality of the executive, legislative, and judicial branches of the Federal Government shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under this section.

federal immunity, for otherwise § 9607(g) would be superfluous. See 2A Sutherland Stat. Const. § 46.06 (4th ed. 1984 rev.) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous . . ."). Since § 9607(a) treats states and the federal government identically -- and since abrogation of states' eleventh amendment immunity requires no less a showing of congressional intent than does waiver of federal sovereign immunity¹³ -- it follows that § 9706(a) does not abrogate states' eleventh amendment immunity, either.

13Arguably, abrogation of states' eleventh amendment immunity would require a greater showing of congressional intent than does waiver of (FOOTNOTE CONTINUED ON NEXT PAGE)

Even if not read as an abrogation of state sovereign immunity, § 9607(a) still performs a meaningful function, *cf. Hutto*, 437 U.S. at 693-94, because it establishes a right of action by the United States against any states that own or operate hazardous waste sites. Suits by the United States against states are not foreclosed by the

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federal sovereign immunity. The difference in the burdens of proof would arise from the fact that federal sovereign immunity, unlike states' eleventh amendment immunity, arises from the common law not the Constitution. See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821); *Jaffe, Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1 (1963) (tracing origins of doctrine in old English cases). We might therefore require greater specificity for the abrogation of state sovereign immunity than for the waiver of federal immunity. However, as that particular question is not before us here, the observations in this footnote are not part of our holding.

eleventh amendment. United States v. Mississippi, 380 U.S. 128, 140-41 (1965), but without § 9607(a) the United States would not be able to sue the states under CERCLA's generous terms.¹⁴ Since the United States does not most of the initial clean-up and then sues for reimbursement, our reading leaves § 9607(a) with substantial importance.

B. Section 9607(e)(2) and Subrogation Rights

Section 9607(e)(2) states that "[n]othing in this subchapter. . . shall bar a cause of action that. . . any . . . person subject to liability under this

¹⁴Most significantly, CERCLA allows for full recoupment of clean-up costs and strict liability. 42 U.S.C. §§ 9607(a), (c). If the United States could not sue states under CERCLA, it might be left sue each state under its own tort law.

section . . . has or would have, by reason of subrogation." Union Gas argues that this section allows it to subrogate to the rights of the United States against Pennsylvania once the United States settled its case against Union Gas. Since the United States could sue Pennsylvania, *see supra* Part IV.A, Union Gas argues, so should Union Gas be able to do so, through the device of subrogation.

Section 9607(e)(2) simply cannot bear the burden it must to abrogate the states' eleventh amendment sovereign immunity. That section does not even mention the eleventh amendment or suits against states. There is no evidence in the legislative history of § 9607(e)(2) that Congress intended private parties to inherit all of the rights of the United States including the right to override the states' right

not to be sued by private citizens in federal court, and we cannot ascribe such an intention to Congress.¹⁵ Once again, if our refusal to read § 9607(e)(2) as an abrogation provision rendered that section meaningless or contradictory, we would have to reconsider our position. But our holding that § 9607(e)(2) does not allow private parties to sue states leaves it open for private parties to sue other private parties or the United States in the appropriate circumstances. Thus, under our reading, § 9607(e)(2) retains a significant role.

¹⁵Union Gas cites only one case to support the proposition that a party that subrogates to the right of the United States inherits the right to sue states. *Prairie State National Bank v. United States*, 164 U.S. 227 (1896). That case did not contain any constitutional issues, let alone the particular issue of eleventh amendment sovereign immunity. No state was even a party in that case.

C. CERCLA's Broad Policy

CERCLA was intended "to initiate and establish a comprehensive response and financing mechanism to abate and control the vast problems associated with. . . hazardous waste disposal sites." H.R. Rep. No. 1016, 96th Cong., 2d Sess. 22, reprinted in [1980] U.S. CODE CONG. & AD. NEWS 6119, 6125. Fastening on the word "comprehensive" in this passage and on similar expressions elsewhere of Congress' resolve to deal with hazardous waste sites with one fell swoop. see e.g., S. Rep. No. 848, 96th Cong., 1st Sess. 12 (1980)(bill "is designed to help address many of the problems faced by society as a result of chemical contamination."). Union Gas argues that Congress must have intended to abrogate states' immunity or

else CERCLA would be less than "comprehensive" and all-encompassing. The inevitable conclusion, the argument runs, is that CERCLA must be an abrogation of states' eleventh amendment immunity.

While the previous two arguments relied on the language of CERCLA itself, this one relies exclusively on CERCLA's legislative history. It therefore faces a particularly heavy burden that it is unable to bear. Not only is there nowhere near the overwhelming evidence relied upon by the Supreme Court in Hutto v. Finney, 437 U.S. at 694, but there is simply no indication anywhere in CERCLA's legislative history that Congress considered abrogating the eleventh amendment or even contemplated

CERCLA suits against states.¹⁶ The declaration that a bill will deal "comprehensively" with a problem is commonplace and may be little more than political hyperbole; at all events, it does not rise to the level necessary to deprive states of their constitutional

¹⁶The issue of states' immunity was never squarely addressed by either house of Congress in the CERCLA debates. The eleventh amendment was mentioned not once in any document or discussion pertaining to CERCLA. It can be argued that the Senate debates suggest that to the extent there was any consideration of the matter of sovereign immunity, it was thought that states would retain their immunity. Senator Randolph, for example, stated that the purpose of CERCLA liability provisions was to "provide that the funds be financed largely by those industries and consumers who profit from products and services associated with the hazardous substances which impose risks on society." 126 Cong. Rec. 30932 (Nov. 24, 1980). This statement would appear not to include states. However, this argument is not necessary to our conclusion, and we note it only in the interests of completeness.

rights. The legislative history falls far short of providing a "formal indication of Congress' intent to abrogate the States' Eleventh Amendment immunity," *id.* at 697 n.27, and Union Gas' argument from legislative history thus fails.

D. A Comparison Of CERCLA with other Environmental Statutes

CERCLA was not the first congressional effort to deal with environmental problems by creating causes of actions against polluters. The Clean Air Act, the Resource Conservation and Recovery Act (RCRA), and the Federal Water Pollution Control Act all authorize citizens' suits against polluters. In each case, the legislation specifically provides that any citizen may sue violators of the relevant statute to enforce the terms of

the act and that if the violators are states they may be sued "to the extent permitted by the Eleventh Amendment to the Constitution." See 42 U.S.C. § 7604 (1982)(Clean Air Act); 42 U.S.C. § 6972 (1982)(RCRA); 33 U.S.C. § 1365 (1982) (Federal Water Pollution Control Act).

Because CERCLA does not have an analogous provision for citizens' suits,¹⁷ § 6907, which limits standing to those who have incurred response or remedial expenses in cleaning up releases of hazardous substances, is the closest analogy in CERCLA to the citizens' suit provisions of the other statutes. Union Gas points out that unlike those provisions in the other

statutes, CERCLA does not have an explicit eleventh amendment limitation and concludes that the absence of such a limitation in CERCLA is sufficient evidence that Congress intended CERCLA to abrogate the eleventh amendment.

Our answer, by now familiar, but no less applicable or correct, is that this evidence is simply insufficient to overturn the states' constitutional right to immunity. In the first place, the citizen suit provisions in the other three statutes are fundamentally different from § 9607, for whereas those provisions permit only injunctive relief to enforce the terms of each statute, § 9607 permits recoupment of clean-up expenses, an action for damages. Thus, the analogy is inexact. More fundamentally, even if

¹⁷There are bills currently in Congress that would amend CERCLA to allow for citizens suits. The bills are discussed *infra* at pp. 21-22.

the citizen suit provisions allowed for damage remedies as does § 9607, we do not believe that the comparison between the statutes would constitute a showing of congressional intent sufficient to abrogate eleventh amendment immunity. None of the Supreme Court cases cited above, nor any other case of which we are aware in any court, has read a statute to abrogate eleventh amendment immunity on the basis of what the statute did not say. Congressional silence, except in the rarest of cases, is not unequivocal evidence of congressional intent. To interpret congressional silence as express abrogation, therefore, would be improper. See Employees, supra, 411 U.S. at 285 ("It is not easy to infer that Congress. . . . desired silently to deprive the States of an immunity they have long enjoyed. . . .").

Our position is unchanged by recently proposed amendments to CERCLA that would provide for citizen suits. Both the House and the Senate have passed bills amending CERCLA in various respects. See H.R. 2817, 99th Cong., 1st Sess. (1985)(House Bill); H.R. 2005 (Senate Bill). The bills are scheduled for joint conference, and are not yet law. Among the amendments are ones analogous to the citizen suit provisions in the Clean Air Act, Federal Water Pollution Act, and RCRA, that allow citizens to bring suits against any violators of CERCLA, or against the President, to enforce compliance with CERCLA. Like those other provisions, the proposed CERCLA citizen suit provision would permit suits against states "to the extent permitted by the Eleventh Amendment." See H.R. 2817 § 150;

H.R. 2005 § 310. Union Gas argues that the facts that the proposed amendments would include the eleventh amendment limitation and that § 9607 does not include it imply that § 9607 was intended to abrogate the eleventh amendment.¹⁸

Subsequent legislation declaring the intent of an earlier statute is entitled to great weight in judicial statutory interpretation. Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 380-381 (1969). There is no evidence, however, to support Union Gas' contention that the proposed amendments

¹⁸Union Gas explains: "[I]f [the proposed amendments] were to become law, it would suggest that Congress had abrogated and intended to continue the abrogation of states' Eleventh Amendment immunity as to [42 U.S.C. § 9607] suits brought by parties that have paid clean-up costs but not as to the new categories of citizen suits."

are a response to the terms or perceived meaning of § 9607. Union Gas points to no legislative history of the proposed amendments that suggests that the Congress considering the amendments thought that § 9607 abrogated the eleventh amendment and made a conscious decision to distinguish the amendments by limiting the scope of the citizens' suits. Our independent review of the legislative history has also turned up no evidence that the proposed amendments reflect the current Congress' judgment about the scope and meaning of § 9607. Without any such evidence, the amendments cannot withstand the burden of proof that abrogation demands.¹⁹

¹⁹There is a perfectly reasonable explanation for the eleventh amendment limitations in the proposed citizen suit provisions according to which those limitations are not a response to the

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V. CONCLUSION

We hold that CERCLA does not evidence congressional intent to abrogate states' eleventh amendment immunity. The judgment of the district court will be affirmed.

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scope of § 9607: it may be simply that the proposed CERCLA citizen suit provisions were modeled after the analogous provisions in the other environmental statutes, without regard to § 9607.

On account of the lack of evidence that the proposed amendments are a response to the current Congress' understanding of § 9607, we do not have to decide how much weight we would give the amendments if they were in fact motivated by a current legislative interpretation of § 9607. Because the proposed amendments are not yet, and may never be, law, the amendments deserve less weight than they would otherwise. Cf. Southern Community College v. Davis, 442 U.S. 397, 411 n.11 (1979) (statements of legislators or congressional committees after the enactment of a law are not entitled to the same interpretative weight as subsequent legislation).

A. LEON HIGGINBOTHAM, JR., Circuit Judge, dissenting.

When a statute in its definitional section declares unequivocally that the term "person" includes a "State, municipality, commission, political subdivision of a State, or any interstate body" 42 U.S.C. § 9601(21) (emphasis added), the explicit language of Congress should not be disregarded where there is no legislative history suggesting that Congress did not mean what they said when they used the word "state." Instead of giving Congress the presumption that they know what a state is, the majority seems to assume that judges have a better mastery and understanding of the English language than does Congress, and thus they roam through inconclusive legislative history to "demonstrate" that Congress did not mean state when they included that

specific phrase in the key definitional section of the statute. In the future, to comply with the rationale of the majority, in definitional sections of similar statutes where remedies are provided for damages citizens or corporations have suffered, Congress must use language similar to the following: "The term person includes a state, and we really mean the state, and furthermore the eleventh amendment's prohibition on suits against the states does not apply." In matters of statutory construction of legislation that is as explicit as the statute in issue, no other court has imposed as broad a reading of eleventh amendment prohibitions. I respectfully dissent.

I.

The liability section of Comprehensive Environmental Response Compensation and Liability Act (CERCLA),

42 U.S.C. § 9607, provides that ". . . any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of, . . . shall be liable for . . . any other necessary costs of response incurred by any other person consistent with the national contingency plan. . . ." 42 U.S.C. § 9607(a)(2)(B) (emphasis added). The definitional section of the statute, 42 U.S.C. § 9601, defines person as "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body." 42 U.S.C. § 9601(21) (emphasis added). Inasmuch as the plain language of 42 U.S.C. §§ 9607(a)(2)(B)

and 9601(21), when read jointly, declares that a state is a person for liability purposes pursuant to CERCLA, it follows then that "states" are within the class of potential defendants liable for the costs of the clean-up. The statutory language points unambiguously to a conclusion contrary to that reached by the majority. To reach the conclusion that the word state means state one need not resort to inferences or a *a fortiori* reasoning. One need not fill in what Justice Cardozo calls the "interstitial gaps" of legislation. Nor are we confronted with the problem that Gray so eloquently described in his Nature and Sources of the Law:

The fact is that the difficulties of so-called interpretation arise when the legislature has had no meaning at all: when the question which is raised on the statute

never occurred to it: when what the judges have to do is, not to determine what the legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind, if the point had been present.

J.S. Gray, Nature and Sources of the Law, § 370 at 165, quoted in, B. Cardozo, The Nature of the Judicial Process 15 (1975).

II.

The basic issue is whether the definitional section is sufficiently adequate in itself to find legislative intent to abrogate sovereign immunity. I think it is. When interpreting a statute, the starting point is of course the language of the statue itself.

Consumer Product Safety Commission v. GTE Sylvania, 447 U.S. 102, 108 (1980).

If the language is clear and unambiguous, and there is no "clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Id.*; *see also Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 110 (1983)(same).

In the instant case, there is no legislative history indicating that Congress considered or debated the issue of states' eleventh amendment immunity. From my view, the absence of a debate on this issue merely indicates that Congress was smart enough to know what a state is and therefore, when including states as persons who could be liable under CERCLA, Congress realized the eleventh amendment implications.

Because there is no legislative evidence as to whether Congress intended states to be inclusive or exclusive of CERCLA's liability provision, 42 U.S.C.

§ 9607, the language of the definitional section, 42 U.S.C. § 9602(21), is controlling and should be regarded as authoritative evidence of congressional intent to abrogate states' sovereign immunity. It would seem, therefore, from the clear words of the statute ("person means . . . state, . . ."), that the majority should have reached a different result. Instead, the majority held that "we are bound by [Employees v. Missouri Dept. of Pub. Health & Welfare, 411 U.S. 279 (1973)] to find that the inclusion of 'states' within the class of potential defendants is insufficient to abrogate Pennsylvania's immunity."¹

¹The majority also holds that "[w]e would reach the same conclusion without the guidance of Employees, for there is evidence in CERCLA itself that § 9607(a) was not intended to abrogate states' sovereign immunity." Maj. Typescript at 15. The majority relies (FOOTNOTE CONTINUED ON NEXT PAGE)

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on a separate CERCLA provision, § 9607(g), that explicitly waives federal sovereign immunity. The majority suggests that because § 9607(g) waives federal sovereign immunity, § 9607(a) does not waive federal sovereign immunity; hence, since § 9607(a) treats states and the federal government identically, § 9607(a) does not abrogate states' eleventh amendment immunity either. *Id.* at 15-16.

The majority cites no legislative history to support the weight they give to § 9607(g). At most, Congress was merely being redundant by their inclusion of a waiver of federal sovereign immunity. The redundancy is on the equivalent of demonstrating a congressional intent not to abrogate states' eleventh amendment immunity. The majority's conclusion is contrary to the familiar canon of statutory construction. Because there is no legislative history as to Congress' considering the specific problem of sovereign immunity, the court must rely on the plain language of CERCLA. The language of CERCLA contains a clear indication that Congress intended to allow private citizens to bring suits against states. In view of such clear statutory language, it does not follow that because Congress provided a specific provision abrogating federal government's immunity, Congress' failure to do the same where states are concerned evidenced a conclusive congressional intent not to lift states' sovereign immunity.

Maj. Typescript at 14. I submit that since Employees, *supra*, is patently distinguishable from the case at bar, we are not "bound" to decide this case in favor of states' immunity.

In Employees, the employees of state health facilities brought suit against the state in federal court, seeking overtime compensation due them under the Fair Labor Standards Act ("FLSA") of 1938. The question was whether the employees could sue their state employer in federal court under FLSA. The liability section of FLSA provided in relevant part:

Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case

may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction...

Section 16(b) of FLSA, § 52 Stat. 1069, 29 U.S.C. § 216(b)(1938). The definitional section of FLSA read in relevant part:

"Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

Section 3(d) of FLSA, 52 Stat. 1060, 29 U.S.C. § 203(d)(1938)(emphasis added). In 1966, § 3(d) was amended by

expanding the definition of employer to include a state or a political subdivision with respect to employees "(1) in a hospital, institution, or school referred to in the last sentence of subsection (r) of this section, . . ." Pub. L. 89-601, §102(b), 80 Stat. 831 (1966). In view of the 1966 amendment, FLSA seemingly subjected states to suit along with other employers. However, since the language in §16(b) had not been changed in 1966, the court in Employees concluded that it should not infer that Congress had removed states' immunity from suit without amending § 16(b). The court in Employees said "[i]t would also be surprising in the present case to infer that Congress deprived Missouri of her constitutional immunity without changing the old section 16(b) under which she could not

be sued or indicating in some way by clear language that the constitutional immunity was swept away." Employees, 411 U.S. at 285.

The key distinction between FLSA and CERCLA is that within the evolution of FLSA amendments there were two statutory provisions that caused an ambiguity as to the intent of Congress. In Employees, prior to 1966, there was clear statutory language indicating a congressional intent not to abrogate states' eleventh amendment immunity. But, the subsequent 1966 amendment made the earlier statutory language unclear: as to its applicability - the amended section 29 U.S.C. § 203(d)(1966) made states subject to suit under FLSA while the liability section, 29 U.S.C. § 216(b), remained the same. Read together, these sections could be rationally construed to either deny or allow

states to be subjected to suit by state employees. Thus, the evolutionary language within FLSA spawned ambiguity.

In contrast, in this case, we are not confronted with a statute which at one time declared that a person "shall not include the United States or any State or political subdivision of a State." But to the contrary, here, we have the original statute, never amended for purposes relevant to this case, that has always declared that the state was a person for liability purposes. In view of the familiar canon of statutory construction, the language of FLSA, unlike the language of CERCLA, was not authoritative evidence of clear legislative intent. Cf. Dickerson, 460 U.S. at 110 (the general rule of statutory construction is to look first to the language of

the statute and then to the legislative history if the statute is unclear).

The majority also relies on Atascadero State Hospital v. Scanlon, 105 S. Ct. 3142 (1985) in holding that CERCLA does not abrogate the eleventh amendment bar to suits against the states. Atascadero, *supra*, involved § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1982), which conferred a right of action upon handicapped people who were discriminated against by "any recipient of federal assistance." In Atascadero, a plaintiff sought damages from a state hospital that received federal financial assistance. The Atascadero court, noting that Congress must express its intention to abrogate the eleventh amendment in unmistakable language in the statute itself, held that the "general authorization for suit

in federal court is not the kind of unequivocal statutory language sufficient to abrogate the eleventh amendment." Atascadero, 105 S. Ct. at 3147-49.

The case at bar is distinguishable from Atascadero, *supra*. The statute in Atascadero provides remedies for violations of § 504 by "any recipient of federal assistance" (emphasis added). However, there was no specific statutory language identifying the class of recipients of federal aid, as in CERCLA, as "State, municipality, commission, political subdivision of a State, or any interstate body." Thus, the statute in Atascadero placed liability on a general class of potential defendants.

In the instant case, CERCLA provides that any person who owns or operates any facility at which hazardous waste is deposited is liable for the costs of the clean-up (emphasis added). In addition to the foregoing general liability provision, CERCLA further provides a specific provision identifying the class of potential defendants, i.e., person means state. See 42 U.S.C. § 9601(21). Unlike the statute in Atascadero, the statute in the case at bar does more than place liability on a general class of potential defendants. CERCLA allows states to be subjected to suit by private persons, in "unmistakable language in the statute itself."

In the case at bar, I find no ambiguity in the language of CERCLA and no contrary legislative intent. The majority, therefore, had no occasion to

"look beyond the plain language of the federal statute. . . ." Thorn v. Reliance Van Co., Inc., 736 F.2d 929, 932 (3d Cir. 1984), quoting, Aloha Airlines, Inc. v. Director of Taxation of Hawaii, 464 U.S. 7, 12 (1983). Accordingly, the definitional section of CERCLA, 42 U.S.C. § 9601(21), is controlling. CERCLA was passed with clear congressional intent, evidenced by its unambiguous statutory language, to abrogate states' eleventh amendment immunity.

III.

As judges, we must never forget the complexity and the time constraints of the federal legislative process. Legislators do not have the time or the capacity to anticipate every possible argument that might be made subsequently by creative and clever counsel. They need not thwart every potential argument

in the womb of time by writing volumes of legislative history which say no more than that the legislature meant what they said in the statute. As Justice Cardozo once observed "[w]e do not pick our rules of law full-blossomed from the trees." B. Cardozo, *supra* at 103. In this case, there was a bloom of sufficient specificity for the problems with which Congress was dealing. It is particularly ironic that private parties will now be denied the right to collect millions of dollars in damages² for which they should be reimbursed because

²The amended complaint with revised damage estimates alleges that the United States has spent \$1,400,000 on the clean up, of which \$720,000 was collective from Union Gas under CERCLA. It is the theory of Union Gas that much of the damage was caused by the state. Union Gas alleges that the state:

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the state was the party that improperly "disposed" of hazardous substances to the land and waterways of our Nation. Such a result is absurd and patently unfair when it is based on the assumption that Congress did not really mean

(FOOTNOTE CONTINUED)

. . . caused the alleged release and discharge of coal tar and oil into Brodhead Creek by their acts, omissions and/or negligence including, *inter alia*:

(a) The narrowing of the channel of Brodhead Creek on its western side and restriction of the channel with dikes thereby causing significant downcutting:

(b) Excavating along the toe of the dike and backwater areas;

(c) Failing to take corrective measures to prevent the downcutting.

Appendix ¶12 at 106a-107a.

"states" although it unambiguously included states as persons liable for the harm they cause in disposing of hazardous substances.

To return to Justice Cardozo, he so wisely observed that:

[i]n countless litigations, the law is so clear that judges have no discretion. They have the right to legislate within gaps, but often there are no gaps. We shall have a false view of the landscape if we look at the waste spaces only, and refuse to see the acres already sown and fruitful.

Id. at 129. In this case, from my view the majority has failed to look at the landscape and appreciate the clear statutory language of Congress. I would reverse and remand this case to the district court for further proceedings.

A TRUE COPY:

Teste:

Clerk of the United States
Court of Appeals for the
Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA :
: CIVIL ACTION
v. : NO. 83-2456
: UNION GAS COMPANY :
:

MEMORANDUM

BECHTLE, J.

NOVEMBER 15, 1983

The United States of America has brought suit against the Union Gas Company ("Union Gas") under sections 104 and 107 of the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA" or "the Act"), 42 U.S.C. § 9604 and 9607, and section 311(b)(3) and 311(f)(2) of the Clean Water Act, 33 U.S.C. §1321(b)(3) and 1321(f)(2), for reimbursement of costs of removal and remedial action incurred in the clean-up of hazardous substances.

released from a facility allegedly owned and operated by Union Gas, into Brodhead Creek in Stroudsburg, Pennsylvania. Union Gas has filed a third party complaint under CERCLA against the Commonwealth of Pennsylvania and the Borough of Stroudsburg, alleging that the third party defendants are owners and operators of the facility in question and are therefore responsible for the release of any hazardous substances into Brodhead Creek. Presently before the court is the Commonwealth of Pennsylvania's motion to dismiss the third party complaint on the ground that jurisdiction over it is barred by the Eleventh Amendment to the United States Constitution. As set out below, the court agrees that the Eleventh Amendment bars this suit insofar as the

Commonwealth is concerned. Therefore, its motion to dismiss shall be granted.

The Eleventh Amendment to the federal Constitution embodies the doctrine of state sovereign immunity. It provides as follows:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. CONST. amend. XI.

Accordingly, suits against a state by citizens from either another state or a foreign state are barred. Additionally, although the amendment does not expressly address suits against a state by its own citizens, the Supreme Court has recognized that such suits are also barred. Edelman v. Jordan, 415 U.S. 651, 653 (1974)(citations omitted).

Exceptions to the states' Eleventh Amendment sovereign immunity exist in situations where either the state has consented to the filing of such a suit, Edelman v. Jordan, 415 U.S. 651 (1974); Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945), or Congress has abrogated the states' sovereign immunity by explicit statutory mandate. Parden v. Terminal R. Co., 377 U.S. 184 (1964); Employees v. Missouri Public Health Dept., 411 U.S. 279 (1973). See Quern v. Jordan, 440 U.S. 332 (1974); Hutto v. Finney, 437 U.S. 678 (1978); Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). Union Gas contends that it fits within the latter category. Union Gas claims that in enacting CERCLA, Congress effectively abrogated the states' immunity from suit by private citizens seeking indemnity for costs incurred in the clean-up of hazardous waste sites.

Union Gas's position must be considered in light of a line of Supreme Court cases, the holdings of which may be distilled into a rule which the court shall call the "clear statement rule." The principle embodied in the clear statement rule is that a state cannot be sued pursuant to the liability provisions of a federal law unless Congress provides a clear statement that it intended to abrogate the states' immunity with respect to that law. The origin of this rule may be traced to Parden v. Terminal R. Co., 377 U.S. 184 (1964), where in the Court faced, for the first time, a state's claim of immunity against suit by an individual upon a cause of action expressly created by Congress. The issue to be decided was whether a state that owned and operated a railroad in interstate commerce could successfully plead

sovereign immunity in a federal suit brought against the railroad by its employee under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §51, *et seq.* The Court's analysis focused on the question of whether Congress, in enacting the FELA, intended to subject a state to suit under the circumstances presented. After reviewing the terms and purposes of the FELA, the Court concluded that indeed Congress had intended to allow states to be sued under the FELA's liability provisions. The case ultimately turned on the determination that the state, by engaging itself in the railroad business for profit, had entered into an area normally occupied by private persons and corporations. It had therefore consented to be

subject to the federal regulations applicable to the railroad industry and had waived its sovereign immunity from a suit under the FELA.

The Parden decision was subsequently limited in Employees v. Missouri Public Health Dept., 411 U.S. 279 (1973), a case filed against administrative departments of the State of Missouri by state employees seeking overtime compensation allegedly due them under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §216(b). Despite express language in the Act that its coverage extended to certain state employees, the Court refused to find that Congress had lifted the sovereign immunity of the states "where the purpose of Congress to give force to the Supremacy Clause by lifting the sovereignty of the States and putting

the States on the same footing as other employers¹ is not clear." *Id.* 411 U.S. at 287. After reviewing the pertinent legislative history of the FLSA the Court concluded that if Congress intended to deprive the states of their constitutional immunity, it would not have done so silently. Since there was no "clear language" in either the statute itself or its legislative history which would indicate that the states' constitutional immunity was swept away, the Court ruled that the Eleventh Amendment barred the employees' suits against their state employer. 411 U.S. at 285.

¹The holding did not render the extension of coverage to state employees meaningless because §16(c) of the FLSA permits the Secretary of Labor to bring suit on behalf of state employees for unpaid wages.

In Edelman v. Jordan, 415 U.S. 651 (1974), the Court reversed the Seventh Circuit's holding that a state, by participating in a federal-state aid program governed by federal regulations, had "constructively consented" to a citizen's suit related to the state's administration of that program. The Edelman Court reiterated that in considering a claim of surrender of Eleventh Amendment immunity in the face of federal legislation, "we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.'" *Id.* 415 U.S. at 673 (citations omitted).²

²Following Edelman, the decisions in Fitzpatrick v. Bitzer, 427 U.S. 445 (1976); Hutto v. Finney, 437 U.S. 678

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Congressional awareness and compliance with the Supreme Court decisions setting out the clear statement rule cannot be disputed. Congress has, through clear statutory language and legislative intent enacted a number of

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(1978); and Quern v. Jordan 440 U.S. 332 (1979), have reaffirmed the principle that the "clear statement rule" is the appropriate guideline for examining claims that Congress has lifted Eleventh Amendment immunity through its enactment of particular legislation. Although these cases concern legislation passed pursuant to the Fourteenth Amendment, while the legislation at issue in Employees, Parden, and Edelman was passed pursuant to Article I, the distinction is not material insofar as the existence of the clear statement rule is concerned. See Fitzpatrick, *supra*, 427 U.S. at 452. Succinctly stated, the Fourteenth Amendment cases focus on whether §5 of the Fourteenth Amendment itself provides the clear statement by Congress necessary to allow abrogation of the Eleventh Amendment. Of course, such discussions assume that the clear statement rule is the starting point for the analysis.

laws effectively abrogating a state's immunity in federal court. See e.g., Parks v. Pavkovic, 536 F.Supp. 296, 309 (N.D. Ill. 1982) (Education for All Handicap Children Act of 1975 specifically intended to impose liability on states for certain education costs); Oneida Indian Nation of Wisconsin v. State of New York, 520 F.Supp. 1278, 1305 (N.D. N.Y. 1981) (intent to abrogate state immunity inferred from congressional intent, statutory language and special relationship between the Indian tribe and federal government); modified on other grounds, 691 F.2d 1070 (2d Cir. 1982); Witter v. Pennsylvania Nat'l Guard, 462 F.Supp. 299, 306 (E.D. Pa. 1978) (Vietnam Era Veterans Readjustment Act is an express authorization of federal suits against a state for back pay). Abrogation of immunity in these

cases was premised on a finding that in enacting the particular legislation at issue, Congress clearly expressed its intent to allow states to be sued.

Compare Savage v. Commonwealth of Pennsylvania, 475 F.Supp. 524, 529 (E.D. Pa. 1979) (Civil Rights Act of 1871 not intended by Congress to abrogate a state's immunity (citing Quern v. Jordan, 440 U.S. 332 (1979)); Municipal Authority of Bloomsburg v. Dept. of Environmental Resources, 496 F.Supp. 686, 689 (M.D. Pa. 1980) (Federal Water Pollution Control Act amendments did not abrogate the states' immunity); Stubbs v. Kline, 463 F.Supp. 110, 116 (W.D. Pa. 1978) (Rehabilitation Act of 1973 did not contain the requisite congressional intent to abrogate a state's Eleventh Amendment immunity).

Applying the clear statement rule to the facts of the present case indicates that allowance of the claim against the Commonwealth of Pennsylvania depends on a finding that Congress expressly intended to abrogate a state's sovereign immunity.³ A review of the

³In applying the clear statement rule to the present case, it should initially be noted that the Supreme Court has not yet addressed whether a state can be specifically named as a defendant in a waiver of abrogation case, where the state is being sued under a federal statute, as opposed to a consent case, where the state is being sued under state law. Cf. Alabama v. Pugh, 438 U.S. 781 (1979); Ex parte Young, 209 U.S. 123 (1908). For purposes of deciding the present motion, however this court will assume, without deciding, that a state may be specifically named as a defendant in a suit under a federal statute which abrogates the states' Eleventh Amendment immunity. Of course, a state may, on its own accord, waive its sovereign immunity. Parden v. Terminal R. Co., supra. The Third Circuit Court of

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statutory provisions and legislative history of CERCLA, however, reveals that there is no clear statement of such an intent in CERCLA.

Turning to the actual statutory provisions themselves, the court finds nothing to indicate that Congress intended to allow states to be sued by private citizens under CERCLA. Union Gas's assertion that Congress did intend to lift the states' sovereign immunity centers upon language in Section 9607

(FOOTNOTE CONTINUED)

Appeals has ruled, however, that while Pennsylvania has waived its sovereign immunity in state courts, it has not consented to suits filed in federal court. Skelan Bd. of Trustees of Bloomsburg, 669 F.2d 142, 147 (3d Cir. 1982), cert. denied, 103 S.Ct. 468 (1982).

that any "person" responsible for illegal toxic waste dumping is liable to other "persons" for cost incurred in the clean-up operation.⁴

⁴Section 9607 provides that:

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section --

(1) the owner and operator of a vessel (otherwise subject to the jurisdiction of the United States) or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any

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facility owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for --

(A) all costs of removal or remedial action incurred by the United States Government or a State not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan; and

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release.

42 U.S.C. §9607 (emphasis added).

Section 9601(21) defines a person, for purposes of CERCLA, as "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a state, or any interstate body."

Union Gas argues that, since a "person" includes a state within the meaning of CERCLA, 42 U.S.C. §9601(21), a state would be liable to a private litigant under §9607. This court cannot agree. A similar argument concerning the Fair Labor Standards Act ("FLSA") was suggested by plaintiffs and rejected by the Court in Employees v. Missouri Public Health Dept., *supra*, 411 U.S. 279. In Employees, the term "employers," within the meaning of FLSA, included state-run health institutions. The Supreme Court found, however, that despite this

inclusion, there was no indication of a congressional purpose to permit a citizen to sue the state in federal court. 411 U.S. at 285. The Court refused to imply such a purpose merely because the statute defined "employers" so as to include a particular state-run institution. In view of Employees, Union Gas's argument as to the combined effect of Sections 9607 and 9601(21) of CERCLA must be rejected. Any congressional waiver in CERCLA of the states' Eleventh Amendment immunity from suit must therefore be found in the statute's legislative history.

A review of the legislative background of CERCLA, however, reveals nothing to support a finding that Congress clearly expressed an intent to

abrogate a state's immunity from liability. Neither the House nor the Senate reports indicated an intent to include a governmental entity as a defendant in an action brought by a private party. The Senate debates, however, made numerous references to private companies potentially liable under CERCLA. During one of these debates, it was expressly stated that a specific purpose of the CERCLA or "Superfund" liability provisions is to "provide that the fund be financed largely by those industries and consumers who profit from products and services associated with the hazardous substances which impose risks on society." 126 Cong. Rec. S14963-64 (daily ed. Nov. 2 1980) (statement of Sen. Randolph) (emphasis added). The Senate debates further emphasized that

"[i]ssues of liability not resolved by this act, if any, shall be governed by traditional and evolving principles of common law." 126 Cong. Rec. at S14964. This court reads this last statement to include the common law doctrine of sovereign immunity embodied in the Eleventh Amendment.

In sum, since neither the statutory provisions nor the legislative history of CERCLA reveals the requisite clear statement by Congress, the inevitable conclusion to be drawn is that Congress did not intend to allow private citizens to file suit against a state under this statute. Accordingly, the Commonwealth of Pennsylvania's motion to dismiss shall be granted.

The court's Order was previously entered on October 28, 1983.

LOUIS C. BECHTLE, J.

IN THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF PENNSYLVANIA

UNITED STATES OF : CIVIL ACTION
AMERICA :
v. :
UNION GAS COMPANY :
v. :
COMMONWEALTH OF :
PENNSYLVANIA :
and THE BOROUGH OF :
STROUDSBURG : NO. 83-2456

ORDER

AND NOW, TO WIT, this 13th day of September, 1984, upon motion of the Commonwealth of Pennsylvania to dismiss. IT IS ORDERED that the motion is granted and the amended third-party complaint filed by the Union Gas Company is dismissed for the reasons set forth in this court's Memorandum dated November 15, 1983.

LOUIS C. BECHTLE, J.

In the Supreme Court of the United States

OCTOBER TERM, 1987

COMMONWEALTH OF PENNSYLVANIA, Petitioner

vs.

UNION GAS COMPANY, Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the decision below correctly applies prior decisions of this court?
2. Whether Congress is empowered by the U.S. Constitution to abrogate state immunity in Article I enactments?
3. Whether retroactive liability under CERCLA presents an Eleventh Amendment issue?

PARTIES TO THE PROCEEDINGS

The parties to the proceeding in the United States Court of Appeals for the Third Circuit were as follows:

Appellant: Union Gas Company
Appellee: Commonwealth of Pennsylvania

STATEMENT OF PARTIES AFFILIATED WITH RESPONDENT

The following are parent, subsidiary or affiliate companies of respondent Union Gas Company:

Penn Fuel System, Inc.
North Penn Gas Company
Penn Fuel Gas, Inc.
Gas Oil Products, Inc.
Gas Oil Products Inc. of Delaware
Allied Gas Company
Central Penn Gas Company
Counties Gas Company
Interborough Gas Company
Lewistown Gas Company
South Penn Gas Company

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**In the Supreme Court
of the United States**

OCTOBER TERM, 1987

No. 87-1241

COMMONWEALTH OF PENNSYLVANIA, Petitioner

vs.

UNION GAS COMPANY, Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

CITATIONS TO OPINIONS

The Opinion of the United States Court of Appeals for which Pennsylvania seeks review is reported at 832 F.2d 1343 (1987) ("Union Gas II"). The Opinion of the Court of Appeals which was vacated by Order of this Court, 107 S.Ct. 865 (1987), is reported at 792 F.2d 372 (1986) ("Union Gas I"). The Opinion of the United States District Court for the Eastern District of Pennsylvania which originally dismissed the third party complaint against Pennsylvania is reported at 575 F.Supp. 949 (1983).

JURISDICTION

The judgment of the Court of Appeals was entered on November 3, 1987. Pennsylvania filed its Petition within 90 days of the entry of judgment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution, Amendment XI:

“The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or subjects of any Foreign State.”

2. United States Code, 42 U.S.C. §§9601(21) and 9607(a), P.L. No. 96-510, 94 Stat. 2767 [Comprehensive Environmental Response, Compensation and Liability (“Superfund”) Act of 1980 (“CERCLA”):

9601(21) “‘person’ means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State or any interstate body;”

9607(a) “. . . any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of, . . . shall be liable for . . . any other necessary costs of response incurred by any other person consistent with the national contingency plan. . . .”

3. United States Code, 42 U.S.C. §9601(20)(D) and 9620(a)(1), P.L. No. 99-499, 100 Stat. 1613 [Superfund Amendments and Reauthorization Act of 1986 (“SARA”):

9601(20)(D) The term “owner or operator” does not include a unit of State or local government which acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign. The exclusion provided under this paragraph shall not apply

to any State or local government which has caused or contributed to the release or threatened release of a hazardous substance from the facility, and such a State or local government shall be subject to the provisions of this Act in the same manner and to the same extent, both procedurally and substantively, as any non-governmental entity, including liability under section 107.

9620(a)(1)

In general.—Each department, agency, and instrumentality of the United States (including the executive, legislative, and judicial branches of government) shall be subject to, and comply with, this Act in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 107 of this Act. Nothing in this section shall be construed to affect the liability of any person or entity under sections 106 and 107.

STATEMENT OF THE CASE

The sudden release of coal tar into Brodhead Creek in Stroudsburg, Pennsylvania in October 1980 caused the United States to declare the site the nation’s first emergency Superfund site. Adjacent to the stream from 1890 to 1948 in an industrial section of Stroudsburg had been a carburetted water gas plant which produced coal gas as well as its by-product, coal tar. The EPA regarded in-ground disposal of coal tar as state of the art technology during the first part of this century (see EPA Amended Fund Authorization Report). The company operating the plant changed ownership several times before being merged into respondent in 1978. The plant was dismantled in 1948 and replaced successively by propane and natural gas distribution systems.

Between 1960 and 1962 the State rechanneled, narrowed and deepened Brodhead Creek and erected a dike on its sides.

The Borough of Stroudsburg and later the State obtained a permanent easement or fee title to much of the site. The rechannelization of this fast flowing stream started a process of down-cutting of the stream bank and erosion of the toe of the dike that led to the release of coal tar. It was during repairs to the toe of the dike that coal tar was first discovered. Between April 1981 and January 1982, the United States did a cleanup of the site at an alleged expense of \$967,000.00.

The United States commenced this lawsuit on May 23, 1983 in the United States District Court for the Eastern District of Pennsylvania to recover its cleanup costs pursuant to CERCLA and the Clean Water Act, 33 U.S.C. §§1321(b)(3) and (f)(2), naming respondent as the sole defendant. Respondent filed a third-party complaint naming the Commonwealth of Pennsylvania and the Borough of Stroudsburg as third party defendants alleging that they were owners and operators of a facility at the site within the meaning of CERCLA, 42 U.S.C. §9601(20)(A), and, together with others, negligently caused or contributed to the release of coal tar.

The State moved to dismiss the third-party complaint under Fed. R. Civ. P. 12(b)(1) and 12(b)(6) alleging that it was immune to suit under CERCLA pursuant to the Eleventh Amendment to the Constitution. The district court granted the State's motion (Pet. App., 139a). Thereafter, the United States filed an amended complaint revising its damage claim, and respondent filed an amended third-party complaint. The State again moved to dismiss, and the district court granted the motion for the reasons set forth in its earlier opinion.

As a result of a settlement reached among the United States, respondent and the Borough of Stroudsburg whereby respondent paid a major portion of the cost of cleanup, the district Court dismissed the action. Respondent then appealed the district court's dismissal of Pennsylvania as a defendant to the United States Court of Appeals for the Third Circuit. A two member majority of the Third Circuit affirmed the district court's order, with the Honorable A. Leon Higginbotham filing a vigorous dissent concluding that CERCLA clearly abrogated states' Eleventh Amendment immunity. (Pet. App. 74a)

On October 17, 1986, shortly after respondent filed a petition for certiorari with this Court, the President signed into law SARA, which amended CERCLA. At the urging of respondent herein and the United States, which as amicus contended SARA "authorizes suits against states or local governments for liability or contribution when such entries caused or contributed to the release or threatened release of a hazardous substance," (Amicus Br. at 5-6) this Court granted certiorari, vacated the court of appeals' opinion, and remanded for consideration in light of SARA.

On remand, the court of appeals unanimously reversed the district court holding that the Eleventh Amendment does not bar suit against Pennsylvania. (Pet. App. 1a) The court of appeals further held that (1) the language of CERCLA, as amended by SARA, clearly and explicitly abrogated state immunity, (2) Congress may, consistent with the Constitution, abrogate state immunity in an Article I enactment, and (3) CERCLA, as amended by SARA, applies retroactively to respondent's cause of action.

REASONS FOR DENYING THE WRIT

The issues raised by Pennsylvania are not appropriate for review because a unanimous Third Circuit Court of Appeals correctly resolved them, and its opinion is not in conflict with decisions of this or other courts.

I THE DECISION BELOW CORRECTLY APPLIES PRIOR DECISIONS OF THIS COURT

The court of appeals correctly applied the clear statement rule which this Court has articulated in numerous decisions. The clear statement rule requires that Congress "express its intention to abrogate the Eleventh Amendment in unmistakable language in the statute itself." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 243 (1985). See also *Welch v. State Department of Highways and Public Transportation*, 107 S.Ct. 2941 (1987); *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984). Far from simply paying "lip-service" to this rule, the

court of appeals thoroughly and conscientiously applied it in interpreting CERCLA, as amended by SARA.

The court of appeals correctly concluded that states, like the federal government, are subject to liability to private parties under section 107(a) of CERCLA. In *Union Gas I*, Pet. App. 74a, the court of appeals acknowledged that Congress had made a “person” liable for environmental cleanup costs and “person” was defined to include a state, but held this language did not satisfy the clear statement rule. On remand from this Court, the court of appeals discerned Congress’ unmistakable intent in SARA’s Amendment to section 101(20)(D) of CERCLA, to wit:

a state or local government shall be subject to the provisions of the Act in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 107.

This provision, the court of appeals observed, “replicates” CERCLA’s waiver of federal government immunity. *Union Gas II*, Pet. App. 24a. Indeed, the Congressional conference committee that inserted the above quoted clause stated that its purpose was “to clarify that if the unit of government caused or contributed to the release or threatened release in question, then such unit is subject to the provisions of CERCLA both procedurally and substantively, as any non-governmental entity, including liability under section 107 and contribution under section 113.” (emphasis added) H.R. Conf. Rep. No. 962, 99th Cong., 2d Sess. 185-86, reprinted in 1986 U.S. Code Cong. & Admin. News 3276, 3278-79.

SARA provides other evidence of Congress’ unmistakable intent to abrogate Eleventh Amendment immunity in section 107 actions. First, SARA preserves states’ immunity to suit from citizen suits filed pursuant to section 159. 42 U.S.C. §9659. The citizen suit provision makes “persons” subject to suit only “to the extent permitted by the Eleventh Amendment to the Constitution.” This phrase was the same language used by Congress in prior environmental legislation to preserve states’ Eleventh Amendment immunity. See, Clean Air Act, 42 U.S.C. 7401, 7604; Federal Water Pollution Control Act, 33 U.S.C. 1251,

1365, Resource Conservation and Recovery Act, 42 U.S.C. 3251, 6967. By contrast, there is no similar statutory limitation on section 107 actions under CERCLA.

Second, *Union Gas I*’s analysis relied heavily on the absence in CERCLA of an explicit waiver of state immunity similar to the federal waiver of immunity in section 107(g). 42 U.S.C. 9607(g).¹ In SARA, Congress not only replicated the federal waiver in section 101(20)(D), but it amended the federal waiver of immunity clause to provide that “nothing in this section shall be construed to affect the liability of any person or entity under sections 106 and 107.” 42 U.S.C. §9620(a)(1). Thus, Congress explicitly precluded the analysis used in *Union Gas I*.

Pennsylvania’s interpretation of section 101(20)(D) enlisted no adherents on the court of appeals and lacks all credibility. If, as Pennsylvania contends, this provision was intended to insulate states from liability just to the federal government, it could have been worded to so provide. It was not. Rather, Congress made sure there was no such implication by expressly equating states’ liability to that of nongovernmental entities.

The United States’ own abandonment of sovereign immunity in a statute imposing strict liability is testament to the extent of the Congressional commitment that no one should be immune. By holding that states’ immunity to suit under section 107 is abrogated, *Union Gas II* conscientiously applies the clear statement rule and closes the yawning gap in CERCLA’s regulatory scheme that *Union Gas I* had left.

II IT IS NOW WIDELY RECOGNIZED THAT CONGRESS IS EMPOWERED TO ABROGATE STATE IMMUNITY IN ARTICLE I ENACTMENTS²

1. Section 107(g) was recodified by SARA as section 120(a)(1) of CERCLA. Section 120(a)(1) is quoted in its entirety *supra*.

2. Should this Court grant certiorari, *Union Gas* will contend in its brief on the merits that *Hans v. Louisiana*, 134 U.S. 1 (1890), and its progeny should be overruled since the Eleventh Amendment only precludes federal courts from asserting jurisdiction in diversity of citizenship cases between a state and a citizen of a different state. *Atascadero State Hospital v. Scanlon*, 473 U.S. at 238 (1985) (J. Brennan, dissenting); *Welch v. State Department of Highways and Public Transportation*, 107 S. Ct. at 2958 (J. Brennan, dissenting).

Pennsylvania seeks to augment state immunity and undermine Congressional power through its contention that Congress may *only* abrogate state immunity when acting pursuant to the Fourteenth and later Amendments to the Constitution. This proposition has never been accepted by this Court. *Welch v. State Department of Highways and Public Transportation*, 107 S. Ct. 2941, 2946 (1987); *County of Oneida, New York v. Oneida Indian Nation of New York State*, 470 U.S. 226, 252 (1985), and has been expressly rejected by five courts of appeals. *Union Gas II*, Pet. App. 64-65a; *In re McVey Trucking*, 812 F.2d 311, 328 (7th Cir. 1987) cert. denied 108 S.Ct. 227 (1987); *County of Monroe v. Florida*, 678 F.2d 1124, 1128-35 (2d Cir. 1982) cert. denied, 459 U.S. 1104 (1983); *Peel v. Florida Department of Transportation*, 600 F.2d 1070, 1074-82 (5th Cir. 1979); *Mills Music, Inc. v. Arizona*, 591 F.2d 1278, 1285 (9th Cir. 1979).

Indeed, no court has ever accepted Pennsylvania's proposition for very fundamental reasons. Pennsylvania would have this Court interpret the Constitution on a "time-line". See *Union Gas II*, Pet. App. at 40a. Thus, in Pennsylvania's view, the Fourteenth Amendment is a watershed, and Congress may only abrogate state immunity as to enactments which draw their constitutional authority from the Fourteenth and later Amendments, not from the preceding text of the Constitution. Not only does this proposition violate this Court's admonition that the Constitution must be interpreted as a single instrument, all of whose parts are equal, *Prout v. Starr*, 188 U.S. 537, 543 (1903), but it would measurably diminish Congress' power to protect citizens through the exercise of its Article I powers.

Surely the Eleventh Amendment, which by its own language restricts the judiciary, not Congress, was never intended to limit Congress' Article I powers. Article I, Section 8, of the Constitution, by far the most frequent source of power for congressional enactments, has an effectuating clause similar to that of the Fourteenth Amendment. Clause 18 of Section 8 empowers Congress:

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other

Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof. By comparison section 5 of the Fourteenth Amendment declares:

Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

In both clauses the states ceded to Congress the authority to carry out its enumerated powers, including the abrogation of state immunity. The Eleventh Amendment simply does not, and was not intended to, limit the enabling clause of Article I.

As the court of appeals pointed out, the Constitution itself provides a system of checks and balances so that Congress does not exercise Eleventh Amendment abrogation recklessly. *Union Gas II*, Pet. App. 56a. Congress consists of senators and representatives elected in each state. It is they who determine, in unmistakable language, which federal statutory schemes are so important as to require that states participate and be liable in private party actions. Should Congress perceive that the burden on states of being subjected to suit in federal court has become too onerous, Congress can amend the law to create state immunity from suit.

III

RETROACTIVE LIABILITY UNDER CERCLA DOES NOT PRESENT AN ELEVENTH AMENDMENT ISSUE

CERCLA's retroactive liability does not implicate Eleventh Amendment concerns. Since Congress has the power to abrogate Eleventh Amendment sovereign immunity, it matters not whether Congress utilizes that power in a statute with a prospective or retrospective scope. Issues of the constitutionality of abrogation under the Eleventh Amendment and the constitutionality of retroactive liability under the Fifth Amendment's due process clause are distinct. CERCLA's imposition of retroactive liability has been held to be constitutional under the Fifth Amendment, see, e.g., *U.S. v. Northeastern Pharmaceutical & Chemical Co., Inc.*, 810 F.2d 726, 732-34 (8th Cir. 1986) and

cases cited therein, and Pennsylvania does not contend to the contrary. Therefore, Congress' abrogation of state immunity as to an otherwise constitutional enactment cannot be unconstitutional, and the court of appeals properly followed this Court's precedents in applying the law in effect at the time the appeal was decided. *Union Gas II*, Pet. App. 67-72a; *Andrus v. Charlestone Store Products Co.*, 436 U.S. 604, 607-08, n. 6 (1978); *Thorpe v. Housing Authority*, 393 U.S. 268, 281-82 (1969); *U.S. v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801).

CONCLUSION

For all the foregoing reasons, respondent respectfully urges this Court to deny Pennsylvania's petition for writ of certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

GEORGE F. SPANOS, JR.
CLERK

OCTOBER TERM, 1987

COMMONWEALTH OF PENNSYLVANIA,

Petitioner.

vs.

UNION GAS COMPANY,

*Respondent.*ON PETITION FOR A WRIT OF CERTIORARI
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FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether a provision in the Superfund Act, as amended, referring to state liability without mention of waiver of the eleventh amendment, constitutes the requisite unmistakable expression of Congressional intent necessary to nullify eleventh amendment protections.
2. Whether Congress possesses the power to abrogate the eleventh amendment, without consent of the States, actual or implied, pursuant to article I of the Constitution.
3. Whether a valid Congressional abrogation of the eleventh amendment may be applied retroactively to completed state actions.

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INTEREST OF *AMICI CURIAE*

The *amici curiae* States of New York, California, Connecticut, Illinois, Indiana, Iowa, Kentucky, Maryland, Missouri, New Jersey, New Mexico, North Carolina, Oklahoma, South Carolina, Utah, Vermont, and West Virginia, submit this brief in support of the Commonwealth of Pennsylvania's petition for review on writ of certiorari of the decision rendered by the United States Court of Appeals for the Third Circuit in *United States v. Union*

Gas Company, 832 F.2d 1343 (3d Cir. 1987) (slip opinion contained in Petitioner's Appendix). The court of appeals held that Congress, in enacting the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9601 *et seq.* (1982) ("CERCLA" or "Superfund Act"), as amended by the Superfund Amendments and Reauthorization Act of 1986, P.L. 99-499, 100 Stat. 1613 (1987) ("SARA"), authorized private Superfund suits against the states in federal court and, as such, expressed its intention to abrogate the eleventh amendment to the United States Constitution. Furthermore, the court of appeals found that Congress had the power to so abrogate, without any consent on the part of the states, pursuant to article I of the Constitution. Finally, the court held such abrogation to apply retroactively to state activities undertaken before its enactment.

The eleventh amendment was designed to preserve the important principle of federalism and to protect states from unwarranted intrusions by the federal courts into state treasuries. *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 98 (1984) (*Pennhurst II*) (relying on *Hans v. Louisiana*, 134 U.S. 1, 15 (1890)); *Edelman v. Jordan*, 415 U.S. 651, 668 (1974). The vitality of this constitutional protection has been frequently and consistently reaffirmed by this Court, most recently in *Welch v. Texas Department of Highways and Public Transportation*, 107 S. Ct. 2941, 2949-53 (1987). Despite such precedent, the court below has attempted to restrict severely the protection afforded by the eleventh amendment, not only in the context of the Superfund Act but, potentially, in all areas of state activity where federal regulation exists. By virtually eliminating any limits on Congress' power to abrogate eleventh amendment immunity, both prospectively and retrospectively, the court of appeals has rendered the provision almost completely ineffectual. The *amici* states have a substantial interest in having this Court review the decision of the court below now, before the consequences of such decision become irreversible.

With respect to federal Superfund legislation, the states, without eleventh amendment protection under CERCLA, will be subjected to protracted litigation in federal court which may

have a harsh impact on the states' treasuries and provide a disincentive for states to protect the public health and welfare. Hazardous waste sites exist in all the *amici* states as evidenced by the National Priority List developed pursuant to CERCLA. See 40 C.F.R. Part 300, Appendix B (1987). The states are heavily involved in the cleanup of these sites. Actions taken in the past as well as those currently being undertaken by the *amici* states in providing services essential to the public welfare,¹ pursuant to valid police powers,² or even in response to the presence of toxic substances,³ has resulted in and certainly will lead to increased litigation commenced by private parties against the states in federal court under CERCLA.⁴ Future actions required of the states will be discouraged to the detriment of the public.

¹ Consider, for example, the Commonwealth of Pennsylvania's activities which were at issue before the court below. Pennsylvania undertook to dredge and fill the Brodhead Creek in order to alleviate flooding which had occurred in the area. Certainly, these operations were essential to the public welfare.

² In New York, for example, in response to information concerning the unlawful disposal of hazardous substances, the New York State Police, pursuant to a valid warrant, entered the property in question, discovered the hazardous materials, and roped off the area as a "crime scene." The State Police were subsequently sued in a third-party action for contribution to cleanup costs as an "operator" of the site under CERCLA. The case is currently before Judge Elvin in the Western District of New York for consideration of the state's motion to dismiss on eleventh amendment grounds. *United States v. Freeman*, Civil Action No. 86-748-E (W.D.N.Y.). The State of South Carolina has been sued in a similar third-party action for exerting control over a hazardous waste site by making several regulatory decisions, in the course of its normal governmental functions, which "legedly affected the site. South Carolina prevailed on a motion to dismiss on eleventh amendment grounds before the district court. The decision is currently on appeal. *United States v. Dart Industries, Inc.*, No. 87-3130 (4th Cir.).

³ For example, states have encountered situations in which private parties have asserted that the states are "owners or operators" under CERCLA because they have exerted control over property when conducting in-depth investigations of the contamination present on the site or by performing other cleanup activities. California is one such example. E.g., *United States v. J.B. Stringfellow*, Civil Action No. 83-2501-JMI (C.D. Cal.).

⁴ The litigation often takes the form of a third-party action for contribution to cleanup costs alleging that these state actions have contributed in some way

(Footnote continued)

It is likely that burdens, similar to those discussed above under the Superfund Act, will be borne by the states in other areas of federal regulation should the court of appeals' sweeping pronouncements be applied to those areas. It is, of course, as discussed in this brief, the position of the *amici* states that the court below erred in its construction of CERCLA and ignored critical constitutional issues when evaluating the role played by the eleventh amendment. Whatever the ultimate opinion of this Court with respect to this decision, review of the decision by this Court at this time will provide the necessary guidance to Congress and the states concerning the current vitality of the eleventh amendment. Therefore, the seventeen *amici* states respectfully urge this Court to grant the petition for a writ of certiorari in this matter.

STATEMENT OF THE CASE

Amici rely on the Statement as set forth in the Petition of the Commonwealth of Pennsylvania.

ARGUMENT

The decision of the Court of Appeals for the Third Circuit will have a nationwide effect by substantially broadening the scope of state liability under the Superfund Act and expanding the power of Congress to negate the protections afforded to the states under the eleventh amendment. With the disposition of this case, the court below has disregarded a large body of law already developed by this Court concerning the importance of the eleventh amendment within our federal system and the limitations on Congress' authority to affect that system. This disregard of precedent and the wide impact it will have justify this Court's review of the matter at this time.

1. The court of appeals erred in its holding that CERCLA as amended by SARA evinced Congressional intent to override

to the hazardous waste problem. This type of litigation for monetary damages against the states is exactly the type which is barred by the eleventh amendment. The Framers determined long ago that such matters of liability are more appropriately handled by the state courts. *Pennhurst II*, 465 U.S. at 90.

the eleventh amendment. In determining whether a Congressional act serves to nullify eleventh amendment immunity, irrespective of the authority under which Congress purports to act, this Court has consistently considered the threshold question whether Congress in its enactment has clearly expressed its intent. This Court has demonstrated a great "reluctance to infer that a State's immunity from suit in the federal courts has been negated . . . [in] recognition of the vital role of the doctrine of sovereign immunity in our federal system." *Pennhurst II*, 465 U.S. at 99. "A State's constitutional interest in immunity encompasses not merely *whether* it may be sued but *where* it may be sued." *Id.* (emphasis in original, footnote omitted). For this reason, this Court has established the very specific ground rule that there must be "an unequivocal expression of Congressional intent" before the effect of the eleventh amendment may be neutralized. *Id.*

This Court forcefully enunciated this "clear language" rule in *Employees of the Dept. of Public Health and Welfare v. Missouri Dept. of Public Health and Welfare*, 411 U.S. 279, 285 (1973).⁵ Since then, the requirement has been reaffirmed and strengthened several times. See *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985) (citing *Pennhurst II*, 465 U.S. at 99); *Quern v. Jordan*, 440 U.S. 332, 342 (1979).⁶ Just last term,

⁵ In *Employees*, this Court considered whether employees of Missouri health facilities could sue the state in federal court for overtime pay under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* (1972). The Act applied to "employers" which was defined to include state hospitals. This Court found the definition of "employers" insufficient to demonstrate Congressional intent to deny states of their eleventh amendment immunity. 411 U.S. at 285.

⁶ This Court in *Atascadero* reviewed language in Section § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1982), which provided that remedies for violations of the Act "shall be available to any person aggrieved by any act or failure to act by *any recipient* of Federal assistance" under the Act. 473 U.S. at 245 (emphasis added). States were eligible recipients of such federal assistance, however, the language of the statute was held to be inadequate for purposes of the "clear language" standard. Similarly, in *Quern v. Jordan*, eleventh amendment immunity was determined to be unaltered by the language in 42 U.S.C. § 1983 (1978). 440 U.S. at 342.

Justice Powell observed that this Court "consistently has required an unequivocal expression that Congress intended to override Eleventh Amendment immunity." *Welch*, 107 S. Ct. at 2948. The Court in *Welch* went on to conclude that the statute at issue lacked the requisite "unmistakably clear language." *Id.*⁷ "Because of the role of the States in our federal system, ['a] general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment.['']" *Id.* at 2947 (quoting *Atascadero*, 473 U.S. at 246).

In each of the cases in which this Court has found the statute failed to satisfy the "clear language" rule, *see, e.g.*, *Welch*, 107 S. Ct. at 2947; *Atascadero*, 473 U.S. at 245; *Quern v. Jordan*, 440 U.S. at 342; and *Employees*, 411 U.S. at 285, Congress failed to state specifically that it was eliminating eleventh amendment protections. In fact, there was no mention of the eleventh amendment in these statutes. Without such clear notice, this Court has demonstrated an emphatic unwillingness to infer that states should be deprived of this constitutional defense. It is with this backdrop of precedent that the court of appeals most remarkably concluded that an amendment to the definitional section of CERCLA, without mention of the eleventh amendment in its language, clearly expressed Congress' intent to abrogate the eleventh amendment.

The first decision by the court below in *United States v. Union Gas*, 792 F.2d 372 (3d Cir. 1986)(slip opinion contained in Petitioner's Appendix) correctly relied on this Court's opinion in *Employees*, 411 U.S. at 285, in determining that the eleventh amendment barred the action under CERCLA. 792 F.2d at 379-80. Specifically addressed was the question whether the inclusion of states in the definition of "person" under CERCLA constitutes a waiver of a state's eleventh amendment immunity.

⁷ The provision considered and rejected in *Welch* was § 33 of the Jones Act, 46 U.S.C. § 688 (1975), which provided that "any seaman who shall suffer personal injury in the course of his employment may . . . maintain an action for damages at law. . ." and that in such action jurisdiction lies in the federal district courts. 107 S. Ct. at 2947.

42 U.S.C. § 9601(21) (1982).⁸ The court of appeals found that the liability provision of CERCLA, 42 U.S.C. § 9607 (1982),⁹ did not allow for private suits against states in federal court simply because of the definition of "person," but did empower the United States to sue the states under the statute.¹⁰

The proposition that private suits against a state are not authorized by CERCLA is not altered by the SARA amendments to the Superfund Act. Specifically, the definitional section of CERCLA, 42 U.S.C. § 9601(20) (1982), was amended by SARA to include the following new subparagraph:

(D) The term "owner or operator" does not include a unit of State or local government which acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign. The exclusion provided under this paragraph shall not apply to any State or local government which has caused or contributed to the release or threatened release of a hazardous substance from the facility, and such a State or local government shall be subject to the provisions of this Act in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title.

CERCLA, 42 U.S.C.A. § 9601(20) (West Supp. 1987).

⁸ "Person" as defined in CERCLA includes "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, Municipality, commission, political subdivision of a state, or any interstate body." 42 U.S.C. § 9601(21) (1982).

⁹ The liability provision of CERCLA, 42 U.S.C. § 9607(a) (1982), provides, *inter alia*, that any person who disposes of hazardous substances or who owns or operates, at the time of disposal, a facility at which hazardous substances were disposed of, shall be liable for the costs of removing the hazardous substances.

¹⁰ Suits by the United States against states are not foreclosed by the eleventh amendment. *United States v. Mississippi*, 380 U.S. 128, 140-41 (1965).

The specific purpose of the amendment was to exclude from the definition of "owner or operator" any state or local government which acquired title or possession involuntarily or by virtue of its function as sovereign. "These are not cases where the law intended that governments bear the liability burdens of Superfund. . . ." 131 Cong. Rec. S11619 (daily ed. September 17, 1985) (comments of Senator Stafford). *See also* the Conference Report accompanying SARA, H.R. Rep. No. 962, 99th Cong., 2d Sess. 185 (1986). Only if the government has "caused or contributed" to the release or threatened release of a hazardous substance when it acquired ownership or possession in these instances does the liability provision of section 9607 apply. As the court of appeals stated before the passage of the SARA amendments, however, a state may be held liable in federal court for damages under CERCLA to the United States only. *Union Gas*, 792 F.2d at 380. The new language of SARA contained in the definition of owner or operator merely redefines the extent of that liability to the United States to protect "innocent" states.

If Congress had intended to repudiate the eleventh amendment under CERCLA, as discussed above, Congress would have had to do so using "unequivocal" language. Congress certainly would not have chosen to hold states liable only in their capacity as owners or operators of hazardous waste sites who cause or contribute to the release of hazardous substances and to allow those states which simply dispose of hazardous substances at sites owned by others to remain protected by the eleventh amendment. The new language of section 9601(20)(D) found in the definition of "owner or operator," however, suggests that such a bizarre interpretation of Congressional intent is possible.¹¹ This demonstrates that the language is hardly unequivocal and much too vague to establish across-the-board eleventh amendment abrogation. The only interpretation of the language which

¹¹ It is a canon of statutory construction that absurd consequences be avoided. *United States v. Bryan*, 339 U.S. 323, 338 (1950); *United States v. Kirby*, 74 U.S. 482, 486 (1869).

makes sense is that it applies to state liability to the federal government.

Neither the original language of CERCLA nor the new language of SARA expresses Congress' intention to abrogate the eleventh amendment. As was the case in *Welch*, *Atascadero*, *Quern*, and *Employees*, there is no mention or discussion of waiver or nullification of eleventh amendment immunity either in the statutes themselves or in any relevant legislative history. In light of all of the important governmental functions which states perform, it cannot be inferred that Congress meant to deprive the states of their guaranteed immunity without "indicating in some way by clear language that the constitutional immunity was swept away." *Employees*, 411 U.S. at 285.

2. *The court of appeals erred in its conclusion that Congress may unilaterally abrogate eleventh amendment immunity when acting pursuant to its powers under article I.* "[']That a State may not be sued without its consent is a fundamental rule of jurisprudence. . . .["] *Pennhurst II*, 465 U.S. at 98 (quoting *Ex Parte State of New York No. 1*, 256 U.S. 490, 497 (1921)). An exception to this fundamental rule was established by this Court in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). Congress, when acting pursuant to section 5 of the fourteenth amendment, may abrogate the eleventh amendment without the states' consent.¹² This is in recognition of the unique character of the fourteenth amendment.

The fourteenth amendment clearly contemplates limitations on a state's power. *Id.* at 453-456. By its terms, section 1 grants individuals certain protections as against the states. Section 5

¹² The only other limited exceptions established by this Court are not relevant here. *See Ex Parte Young*, 209 U.S. 123 (1908) (holding eleventh amendment does not prevent federal courts from granting prospective relief against state officials to stop violation of federal law); *United States v. United States Fidelity and Guaranty Corp.*, 309 U.S. 506 (1940) (recognizing a partial implied waiver of eleventh amendment immunity with respect to certain counterclaims when a state initiates an action in federal court).

specifically empowers Congress such that “[it] may, in determining what is [‘]appropriate legislation[‘] for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts.” *Id.* at 456. Thus, the eleventh amendment is “necessarily limited by § 5 of the Fourteenth Amendment.” *Id.* at 456.¹² This principle was reaffirmed in *Atascadero*, 473 U.S. at 238, and again most recently in *Welch*, 107 S. Ct. at 2946.

CERCLA and the SARA amendments were not enacted by Congress pursuant to the fourteenth amendment. Therefore, the issue before the court below was whether Congress possessed the authority to abrogate the eleventh amendment without consent of the states when legislating pursuant to its other powers; in this case, the commerce clause, U.S. Const., art. I, § 8, cl. 3. The court of appeals, citing *Welch*, 107 S. Ct. at 2946, and *County of Oneida, New York v. Oneida Indian Nation of New York State*, 470 U.S. 226, 252 (1985), found that the Supreme Court had not spoken on this question and therefore reviewed it as a case of first impression. The court then erroneously concluded that any plenary power under the Constitution provides the ability for Congress to abrogate unilaterally the constitutional protections guaranteed to the states without their consent.

Although this Court may not have reached the precise question in *Welch* and *County of Oneida*, the court of appeals erred in its analysis by ignoring significant precedent established in other decisions of this Court. As demonstrated below, in each case which considered limitations on the eleventh amendment

¹² The fourteenth amendment was ratified with awareness of the eleventh amendment and is recognized as a limitation on that amendment. *Fitzpatrick*, 427 U.S. at 456. So too, by their terms, are the thirteenth (abolishing slavery), fifteenth (concerning right to vote), nineteenth (concerning women’s suffrage) and twenty-fourth (prohibiting poll taxes) which all 1) grant individuals protection against the states and 2) grant authority to Congress to enact legislation to enforce the respective constitutional protections. This Court, however, has not yet addressed these amendments in the context of the eleventh amendment.

created by the operation of statutes outside the sphere of the fourteenth amendment, this Court has required the element of state consent. Specifically, this Court has indicated that limitations on eleventh amendment immunity may be found in these cases only if Congress has acted in these statutes to induce states to waive their immunity by their participation in certain activities regulated under the statutes. The participation by the states in these activities might then be interpreted as constituting an implied waiver of the eleventh amendment if the participation is voluntary with full knowledge of the consequences. See *Edelman v. Jordan*, 415 U.S. at 672.

The theory of implied waiver was first announced by this Court in *Parden v. Terminal R.R. Co.*, 377 U.S. 184 (1964), which concerned a statute enacted pursuant to the commerce clause.¹³ Of course, a state does not impliedly waive its immunity simply by operating in a federally regulated sphere. Congress must first express itself in “clear language” if it wishes to condition a state’s participation in an activity subject to federal regulation “on the forfeiture of immunity from suit in a federal forum.” *Employees*, 411 U.S. at 285. Only after such clear expression by Congress may it then be determined whether the extent of the state’s participation in that activity constitutes an implied waiver of the eleventh amendment.¹⁴

¹³ This Court recently in *Welch*, 107 S. Ct. at 2948, overruled *Parden* to the extent that it was “inconsistent with the requirement that an abrogation of Eleventh Amendment immunity by Congress must be expressed in unmistakably clear language” *Parden* continues to stand for the proposition that, under certain circumstances, Congress may condition state activities upon waiver of eleventh amendment protections, even though *Welch* considered the specific statute in *Parden* insufficient with respect to the “clear language” standard. *Id.*

¹⁴ The state activity at issue in *Parden* was operation of a railroad for profit, an activity outside the scope of normal governmental function. 377 U.S. at 195. In contrast, the activity in *Employees* was the operation of state hospitals. 411 U.S. at 284. In light of this Court’s reluctance to find forfeiture of eleventh amendment immunity, a state’s involvement in providing an essential service

(Footnote continued)

The power of Congress to touch the constitutional protections of the eleventh amendment under the spending clause, U.S. Const., art. I, § 8, cl. 1, has also been considered by this Court. Again, waiver by the states was regarded as a critical element in determining whether eleventh amendment protections remained available to the states under statutes enacted pursuant to the spending clause. "The legitimacy of Congress' power to [abrogate the eleventh amendment] ... under the spending power . . . rests on whether the State voluntarily and knowingly accepts [those] . . . terms. . . ." *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981) (*Pennhurst I*). The "analysis relevant to Spending Clause enactments," assuming the "clear language" test is met, therefore focuses on whether a state by its participation in a program authorized by Congress has in effect consented to the abrogation of eleventh amendment immunity. *Atascadero*, 473 U.S. at 246-7, n. 5.

While admitting that this Court has drawn a distinction between article I and the fourteenth amendment in evaluating Congress' power to abrogate the eleventh amendment, the court of appeals incorrectly describes the distinction as being the level of clarity required in the language of a statute to demonstrate the abrogation. It seems to suggest that statutes enacted under the fourteenth amendment do not require the same unequivocal language as must be evident in statutes enacted pursuant to article I. The distinction posited by the court below does not exist. This Court has consistently stated that, even under the fourteenth amendment, an unequivocal expression of congressional intent is required. *Welch*, 107 S. Ct. at 2946; *Pennhurst II*, 465 U.S. at 99. Instead, the distinction between abrogation under article I and the fourteenth amendment is based upon the requirement under article I for some cognizant waiver of eleventh amendment immunity by a state's action. The court of appeals

for the public welfare should never be construed as providing the requisite consent to waiver of the eleventh amendment. Certainly, the activities which are outlined *supra* at ns. 1, 2 and 3 are not activities which should trigger waiver of eleventh amendment protections.

attempts to wipe out this requirement and by doing so renders the eleventh amendment virtually meaningless.

The Court of Appeals for the Ninth Circuit, in its recent decision in *Collins v. Alaska*, 823 F.2d 329, 332 (9th Cir. 1987), recognized Congress' power to abrogate the eleventh amendment, without consent of the states, when acting pursuant to the fourteenth amendment. The court also acknowledged Congress' power to abrogate with respect to other enumerated powers. This second type of abrogation, however, was found to require waiver of state immunity, whether actual or implied. The *Collins* case was decided ultimately on the question of compliance with the "clear language" rule, which the court of appeals held had not been demonstrated. Although the Ninth Circuit decision is not in direct conflict with the decision challenged here, it demonstrates the urgency for this Court to review the instant matter in order to dispel the confusion that exists.

3. *The court of appeals erred in finding that the purported Congressional abrogation of eleventh amendment immunity in CERCLA could be applied retroactively.* Possibly the most onerous of the court of appeals' findings is the one applying the adjudged abrogation retroactively to completed state activities. As discussed above, the concepts of state consent and waiver are fundamental in eleventh amendment analysis. *Edelman*, 415 U.S. at 672; *Employees*, 411 U.S. at 285. "By insisting that Congress speak with a clear voice" when conditioning state activity upon waiver of its eleventh amendment immunity, this Court has "enable[d] the States to exercise their choice knowingly, cognizant of the consequences of their participation." *Pennhurst I*, 451 U.S. at 17. "There can, of course, be no knowing acceptance if a state is unaware" of the abrogation. *Id.*

The court below found that the 1986 SARA amendments provided the language in CERCLA to abrogate the eleventh amendment. The relevant activities of the Commonwealth of Pennsylvania were completed several years before enactment of the amendments. No action on the part of the Commonwealth could

constitute implied consent or a knowing waiver of its eleventh amendment immunity.¹⁸ To allow such a waiver to be implied retroactively, or to apply a sweeping abrogation retroactively without regard for consent either actual or implied, would completely destroy the constitutional protections this Court has so carefully preserved.

States are provided by the eleventh amendment with the opportunity, free of interference from the federal judiciary, to establish their own laws and judicial forums to decide issues of private damages which will affect their treasuries and in turn their citizens. In view of the important functions performed by the states for the benefit of their citizens, public policy dictates that this protection from federal intrusion should not be stripped away silently without the knowledge and consent of the states.

CONCLUSION

The *amici curiae* states span the continent. They are large and small, urban and rural. Together they present the concern that a refusal by this Court to review the *Union Gas* decision would result in the diminution of the states' eleventh amendment protections and would severely restrict not only the Commonwealth of Pennsylvania but *all* states in essential governmental activities. For this reason and on the basis of all the arguments set forth above, this Court should grant the petition for a writ of certiorari.

Dated: New York, New York
February 22, 1988

Respectfully submitted,

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* As shown in n. 14, *supra*, "[t]o suggest that the State had the choice of either ceasing operation of these vital public services or ['consenting'] to federal suit suffices. . . to demonstrate that the State had no true choice at all. . . ." *Employees*, 411 U.S. at 296 (Marshall, J., concurring).

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IN THE SUPREME COURT
THE UNITED STATES

October Term, 1987

6
Supreme Court, U.S.
OF E I L E D
MAY 26 1988
JOSEPH F. SPANIOL, JR.
CLERK

COMMONWEALTH OF PENNSYLVANIA,

Petitioner

v.

UNION GAS COMPANY,

Respondent

On Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

JOINT APPENDIX

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RELEVANT DOCKET ENTRIES

<u>Date</u>	<u>No.</u>	<u>Proceedings</u>
1983 5/23	1	Complaint filed.
7/22	4	Answer filed.
7/22		Issue joined.
8/1	5	Deft's third pty. complaint, filed.
8/9	9	Comm. of Pa's Motion to Dismiss Third Pty. Complaint, Memo, Notice, Certificate filed
8/25	10	Deft's memo in support of opposition to third pty deft. Commonwealth of PA's motion to dismiss third pty complaint, filed.
8/30	11	Commonwealth of PA's reply brief to deft's motion to dismiss, filed.
10/20	12	Answer of the Borough of Stroudsburg to third pty. complaint with crossclaim, filed.
10/28	13	Order dated 10/28/83 that Commonwealth of PA's motion to dismiss third pty complaint is granted, all claims against it are dismissed filed. 10/28/83 entered and copies mailed.

<u>Date</u>	<u>No.</u>	<u>Proceedings</u>
11/16	14	Memorandum, Bechtle, J., Dated 11/15/83 Re: Granting Commonwealth's Motion to Dismiss Third Pty. Complaint, filed. 11/17/83 entered and copies mailed.
<u>1984</u>		
4/28	28	Plff's motion to amend complaint, memo, certificate, filed (amended complaint attached).
5/7	29	Union Gas' memo in opposition in motion to amend complaint, certificate, filed.
5/16	30	Order dated 5/16/84 that plffs. motion to amend complaint is granted in part and denied in part, motion granted as to Counts I and II, Count III is denied, plff. shall file copy of amended complaint, filed. 5/16/84 entered and copies mailed.
5/24	31	Amended complaint, filed.
8/9	45	Union Gas Company Answer to Amended Complaint, certificate of service, filed.

<u>Date</u>	<u>No.</u>	<u>Proceedings</u>
<u>1984</u>		
8/10	47	Amended Third Party Complaint, filed.
8/20	48	Motion of Commonwealth of Pennsylvania to Dismiss or in the alternative to strike the amended third party complaint, notice, memo, certificate of service filed.
8/22	49	Union Gas Co.'s Answer to Commonwealth's Motion to Dismiss or strike the amended third party complaint, memo, certificate filed.
9/13	51	Order that Motion of Commonwealth of Pennsylvania to Dismiss is granted, etc., filed.
10/12	53	Answer of Third party deft. to amended third party complaint, counterclaims against plff., filed.
<u>1985</u>		
2/4	83	Order that Action is Dismissed with Prejudice, etc., filed. 2/4/85 entered and copies mailed.

Date No. Proceedings

1985

3/27 84 Notice of Appeal of Union Gas Company, filed. (USCA #85-1177) 3/28/85 copies to: USCA, D. Spitz, J.G. Sheehan AUSA, J.J.C. Donovan, Esq., R.A. Metergia Esq., C.G. Wynkoop, Esq.

3/27 85 Copy of Clerk's Notice of USCA, filed.

4/9 Record complete for purposes of appeal- transcript not needed.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, Plaintiff v. UNION GAS COMPANY, Defendant

COMPLAINT

Plaintiff, the United States of America, pursuant to the authority of the Attorney General and at the request of the Administrator of the United States Environmental Protection Agency alleges that:

1. This is a civil action brought by the United States against Union Gas Company (Defendant) under Sections 104 and 107 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §9604 and 9607,

and sections 311(b)(3) and 311(f)(2) of the Clean Water Act, 33 U.S.C 1321(b)(3) and (f)(2) for the recoupment of costs incurred to date in responding to the release and threatened release of hazardous substances into the environment specifically Brodhead Creek, a navigable water of the United States, from the facility owned and operated by Defendant in Stroudsburg, Pennsylvania.

2. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331, and § 1345, 42 U.S.C. § 9607 and § 9613 and 33 U.S.C. 1321(n). Venue is proper in this district because Defendant resides and has its principal office in this district and is doing business here, 28 U.S.C. § 1391(c), 42 U.S.C. § 9613(b).

DEFENDANT

3. Union Gas Company is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania.

4. The terms "Defendant", "Union Gas Company", and "Union Gas" as they appear in this complaint refer to the Union Gas Company as it presently exists and to all companies of which Union Gas is a successor in interest or an assign.

5. Defendant currently owns and operates a plant for the distribution of natural gas at 203 Main Street Stroudsburg, Pennsylvania.

6. For more than fifty years, Defendant operated a coal gasification plant at 203 Main Street. The coal gasification plant produced coal gas and generated coal tar wastes.

7. Defendant disposed of the coal tar wastes on the 203 Main street premises and properties contiguous thereto by dumping it on the surface, dumping it into pits and injecting it into subsurface levels.

8. Coal tar wastes generated by Defendant have reached the ground-water under the 203 Main Street site and migrated into Brodhead Creek, a navigable water of the United States.

9. Coal tar is migrating and will continue to migrate towards Brodhead Creek. This migration constituted a release and a substantial threat of future release of coal tar into Brodhead Creek.

10. Some of the constituents of coal tar are acenaphthene, ethyl benzene, flouranthene, phenanthrene, and

pyrene which are designated as toxic pollutants pursuant to Section 307(a) of the Clean Water Act (CWA), 33 U.S.C. § 1317(a). Naphthalene and xylene, also found in coal tar, are designated as hazardous substances pursuant to Section 311(b)(2)(A) of the Clean Water Act, 33 U.S.C. § 1321(b)(2)(A). 40 C.F.R. 116.4.

11. Coal tar contains creosote oil the sludge of which is a hazardous substance under Section 3001 of the "Resources Conservation and Recovery Act" (RCRA), 42 U.S.C. § 6921, 45 Fed. Reg. § 261.32 (May 19, 1980).

12. Substances listed pursuant to Sections 307 and 311 of CWA and Section 3001 of RCRA are hazardous substances under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).

13. Coal tar has been found in Brodhead Creek, in the groundwater under and surrounding the Union Gas facility,

and in pits and borings on and surrounding the Union Gas facility.

FIRST CLAIM FOR RELIEF

14. The allegations contained in paragraphs 1 through 13 are realleged.

15. Section 104 of CERCLA, 42 U.S.C. § 9604, provides in pertinent part:

104(a)(1) - Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare,

the President is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time (including its removal from any contaminated natural resource), or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment,

104(b) - Whenever the President is authorized to act pursuant to subsection (a) of this section, or whenever the President has reason to believe that a release has occurred or is about to occur, or that illness, disease or complaints thereof may be attributable to exposure to a hazardous substance, pollutant, or contaminant and that a release may have occurred or be occurring, he may undertake such investigations, monitoring, surveys, testing, and other information gathering as he may deem necessary or appro-

priate to identify the existence and extent of the release or threat thereof, the source and nature of the hazardous substances, pollutants or contaminates involved, and the extent of danger to the public health or welfare or to the environment. In addition, the President may undertake such planning, legal, fiscal, economic, engineering, architectural, and other studies or investigations as he may deem necessary or appropriate to plan and direct response actions, to recover the costs thereof, and to enforce the provisions of the Act.

16. The Administrator of the Environmental Protection Agency is the President's delegate under Section 104(a) and (b) of CERCLA, 42 U.S.C. § 9604 (a) and (b), as provided for in Section 2(e) of E.O. No. 12316, 46 Fed. Reg. 42237 (August 14, 1981).

17. Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), provides, in pertinent part:

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section -

(1) the owner and operator of ... a facility,

(2) any person who at the time of disposal of any hazardous substance owned or

operated any facility at which such hazardous substances were disposed of,

* * *

(4)shall be liable for -

(A) all costs of removal or remedial action incurred by the United States Government ... not inconsistent with the national contingency plan

18. Section 101(9) of CERCLA, 42 U.S.C. § 9601(9), defines "facility" to include:

(B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located . . .

19. The Union Gas site is a facility within the meaning of Section 101(9) of CERCLA, 42 U.S.C. § 9601(9) and an onshore facility within the meaning of 33 U.S.C. 1321(a).

20. Defendant Union Gas is a person as defined by Section 101(22) of the Act, 42 U.S.C. § 9601(22).

21. Section 101(14) of CERCLA, 42 U.S.C. § 9601 (14), defines "hazardous substance to include:

"(A) any substance designated pursuant to, Section 311(b)

(2)(A) of the Federal Water

Pollution Control Act, (B) any element, compound, mixture, solution, or substance designated pursuant to Section 102 of this Act, (C) any hazardous waste having the characteristics identified under or listed pursuant to Section 3001 of the Solid Waste Disposal Act . . . (D) any toxic pollutant listed under Section 307(a) of the Federal Water Pollution Control Act, . . ."

22. The materials identified in paragraph 10 of this complaint are hazardous substances within the meaning of § 101(14) of CERCLA, 42 U.S.C. § 9601 (14).

23. Section 101(22) of CERCLA, 42 U.S.C. § 9601(22), defines "release" as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment..."

24. Prior to the response measures of the administrator described in paragraph 29, releases from the Union Gas facility into the environment had occurred, were continuing to occur, and were threatening to occur within the meaning of Section 101(22) of CERCLA, 42 U.S.C. § 9601(22).

25. Defendant Union Gas Company engaged in operation of the Union Gas facility at the time of disposal of coal tar and other hazardous substances at the facility. Defendant is within the class of persons described

as being liable under Section 107(a)(1) and (2) of CERCLA, 42 U.S.C. § 9607(a)(1) and (2).

26. Section 101(25) of CERCLA, 42 U.S.C. 9601(25) defines "response" to mean "remove, removal, remedy, and remedial action."

27. Section 101(23) of CERCLA, 42 U.S.C. § 9601(23) defines "remove" or "removal," in pertinent part, as:

"... the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release

of hazardous substances, the disposal of removed material, or the taking of such other action as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access . . . , action taken under 104(b) of this Act...."

28. Section 101(24) of CERCLA, 42 U.S.C. § 9601(24), defines "remedy" or "remedial action," in pertinent part, as:

"those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment...."

29. The Administrator, after demand upon Union Gas, which company failed to comply, has undertaken response measures not inconsistent with the National Contingency Plan concerning the release and threatened release of hazardous substances from the Union Gas

facility. These measures include, inter alia, the dredging of the back channel of Brodhead Creek and the installation of a slurry wall.

30. The United States has incurred costs to date from the Hazardous Substance Response Fund in excess of \$450,000, in responding to the release and threatened release of hazardous substances from the Union Gas facility plus interest.

31. Section 107 of CERCLA, 42 U.S.C. § 9607, authorizes the recovery of costs incurred by the United States in responding to the release and threatened release of hazardous substances from the Union Gas facility.

32. The Defendant is liable to the United States for all costs, including the costs of removal and remedial actions, that the United States

has incurred in responding to the release and threatened release of hazardous substances from the Union Gas facility. Plaintiff has demanded reimbursement but Defendant has refused and continues to refuse.

SECOND CLAIM FOR RELIEF

33. Plaintiff realleges paragraphs 1 through 10, 13, 19 and 29.

34. Defendant discharged hazardous substances from its onshore facility into Brodhead Creek, a navigable water of the United States (33 U.S.C. 1362(7)) in a harmful quantity in violation of 33 U.S.C. 1321(b)(3).

35. After the discharge, Defendant failed and neglected to remove the hazardous substance from Brodhead Creek and to protect against further discharges.

36. By reason of Defendant's failures, the United States acted pursuant to 33 U.S.C. 1321(c)(1) and incurred expenses in the amount of \$270,000 plus interest.

37. By reason of the foregoing, Defendant became liable by reason of 33 U.S.C. 1321(f)(2) to reimburse the United States for direct and related costs incurred by it.

38. Plaintiff has demanded reimbursement but Defendant has refused and continues to refuse.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully prays that:

1. The Defendant be ordered to pay Plaintiff all costs and expenses Plaintiff has incurred in responding to the hazard created by the release and

threatened release of hazardous substances from the facility into the environment and in responding to the discharge of hazardous substances from its onshore facility into the navigable waters of the United States.

2. The Court award Plaintiff its costs of suit herein and such other relief as the Court finds appropriate and just.

Respectfully submitted,

/s/ _____
CAROL E. DINKINS
Assistant Attorney General
Land and Natural Resources
Division
United States Department
of Justice

/s/ _____
PAUL J. SCHAEFFER
Attorney
Environmental Enforcement
Section
United States Department
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Washington, D.C. 20530
(202) 633-1307

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

/s/
EDWARD S. G. DENNIS, JR.
United States Attorney

OF COUNSEL:

Joseph J.C. Donovan
Office of Regional Counsel
Region III
U.S. Environmental Protection Agency
Philadelphia, PA 19106

Elizabeth Cox, Attorney
U.S. Environmental Protection Agency
Fairchild Building
499 S. Capital Street, S.W.
Washington, D.C. 20460

UNITED STATES OF	:	
AMERICA,	:	
Plaintiff	:	
v.	:	CIVIL ACTION
UNION GAS COMPANY,	:	NO. 83-2456
Defendant	:	Jury Trial
	:	Demanded

ANSWER

Defendant, Union Gas Company,
answers the Complaint filed by plaintiff
as follows:

1. Admitted only that plaintiff so asserts.
2. Admitted.
3. Admitted.
4. Admitted only that plaintiff so asserts. Defendant expressly denies liability of any assignor or predecessor in interest.

5. Admitted.

6. Denied.

7. Denied.

8. Denied.

9. Denied.

10. Denied.

11. Denied.

12. Denied.

13. Denied.

14. Defendant incorporates herein its answers to paragraphs 1 through 13 as though fully set forth.

15. Admitted that the Section is correctly quoted in part, but the quotation is misleading in that it omits the following pertinent proviso:

"unless the President determines that such removal and remedial action will be done properly by the owner or operator of the vessel or facility from which the release or threat of release

emanages, or by any other responsible party."

16. Admitted.

17. Admitted only that the Section is correctly quoted.

18. Admitted only that the Section is correctly quoted.

19. Denied.

20. Denied.

21. Admitted only that the Section is correctly quoted.

22. Denied.

23. Admitted only that the Section is correctly quoted.

24. Denied.

25. Denied.

26. Admitted only that the Section is correctly quoted.

27. Admitted only that the Section is correctly quoted.

28. Admitted only that the Section is correctly quoted.

29 Denied.

30. Denied.

31. Denied.

32. Denied.

33. Defendant incorporates herein its answers to paragraphs 1 through 10, 13, 19 and 29 as through fully set forth.

34. Denied.

35. Denied.

36. Denied.

37. Denied.

38. Admitted.

WHEREFORE, defendant Union Gas Company prays that this Court dismiss the Complaint.

Second Defense

39. The Complaint fails to state a cause of action upon which relief can be granted.

Third Defense

40. The Complaint must be dismissed for plaintiff's failure to join parties known to plaintiff that are indispensable to the just adjudication of this litigation.

Fourth Defense

41. The retroactive application of the statutes and regulations relied on by plaintiff violates defendant's right to due process of law and the United States Constitution's proscription against ex post facto laws.

Fifth Defense

42. Defendant is not liable for the recoupment of costs incurred by the United States in responding to the averred release into Brodhead Creek because the release was caused by the intervening negligent acts and omissions of the United States Army Corps of Engineers, the Pennsylvania Department of Environmental Resources, the Borough of Stroudsburg and other third parties acting in concert with them over whom defendant exercised no control.

Sixth Defense

43. The United States is estopped from recouping the costs incurred by it in responding to the averred release into Brodhead Creek, since the release was caused in whole or

in part by the intervening negligent acts and omissions of the United States Army Corps of Engineers and its agents, employees and contractors over whom defendant exercised no control.

Seventh Defense

44. Defendant has exercised due care in the circumstances. The averred release results from the negligent acts and omissions of the United States Army Corps of Engineers, Pennsylvania Department of Environmental Resources, Borough of Stroudsburg and other third parties acting in concert with them and the consequences of these acts could not have been reasonably foreseen and provided for by the defendant.

Eighth Defense

45. Plaintiff has failed to mitigate its alleged damages.

46. The United States is barred from recouping the response costs sought by the Complaint because its response was: (a) unnecessary and inappropriate for the actual problem involved; (b) inconsistent with the national contingency plan; (c) not based upon a reasonable assessment of the potential for injury from the asserted release; and/or (d) not cost effective.

47. The United States is barred from the recouping of response costs sought by the Complaint because all or part of those costs were: (a) unnecessary or not cost effective and/or (b) not consistent with the national contingency plan.

48. The United States is

barred from recouping the response costs sought by the Complaint because (a) it failed to make an adequate determination of whether the averred release presented an imminent and substantial danger to the public health or welfare, and (b) the proposed remedial plan of a property owner, Pennsylvania Power and Light Company, would have abated the alleged release without further action or expense by the United States.

Ninth Defense

49. Alternatively, even if it is determined that defendant is liable for the response costs and those costs were necessary and appropriate under the circumstances and consistent with the national contingency plan, then defendant is not liable for the entire amount

of the response costs, but only its aliquot share based on the ownership and operation of the coal gasification plant and adjacent real estate by others and the negligent acts and omissions of the United States Corps of Engineers, the Pennsylvania Department of Environmental Resources, the Borough of Stroudsburg and others, and other relevant factors.

WHEREFORE, defendant Union Gas Company prays that the Complaint be dismissed.

July 22, 1983 /s/
Of Counsel: DAVID H. MARION
ROBERT A SWIFT
KOHN, SAVETT, MARION &
Lawrence A. Demase GRAF, P.C.
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900 Oliver Bldg. Phila., PA 19103
Pitts., PA 15222
(412) 434-8600
Attorneys for defendant
Union Gas Company

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF :
AMERICA, :
Plaintiff :
v. :
UNION GAS COMPANY, :
Defendant and :
Third Party :
Plaintiff : CIVIL ACTION
v. : NO. 83-2456
COMMONWEALTH OF :
PENNSYLVANIA and :
THE BOROUGH OF :
STROUDSBURG, :
Third Party :
Defendants :
v. :

THIRD PARTY COMPLAINT

Parties

1. Third party plaintiff is Union Gas Company, the defendant in the above action.

2. Third party defendant, the Commonwealth of Pennsylvania (the "Commonwealth"), is a sovereign political entity which has as two of its agencies the Department of General Services ("DGS") and the Department of Environmental Resources ("DER").

3. The Commonwealth is subject to the jurisdiction and venue of this Court in that sovereign immunity has been legislatively waived by virtue of 42 Pa. C.S. § 8522(b)(4).

4. The Borough of Stroudsburg is a political subdivision of the Commonwealth of Pennsylvania with its principal place of business in Stroudsburg, Monroe County, in the Eastern District of Pennsylvania.

Cause of Action

5. On or about May 23, 1983, the plaintiff United States of America commenced the above action against Union Gas Company. A copy of the Complaint is attached hereto as Exhibit "A".

6. The Complaint alleges that defendant unlawfully discharged coal tar into Brodhead Creek in Stroudsburg, Pennsylvania.

7. For a period of years prior to 1935, coal tar was deposited at a location adjacent to Brodhead Creek currently owned by Pennsylvania Power & Light Company.

8. In or about 1959, at the request and with the assistance of the Commonwealth, acting through DGS and DER, and the Borough of Stroudsburg, the U.S. Army Corps of Engineers relocated the Brodhead Creek stream bed by excavating portions of the earthen barrier between the coal tar and the pre-existing stream bed, and erected dikes and levees thereon.

9. In or about 1960, the Borough of Stroudsburg received permanent easements over the portion of Brodhead Creek and its adjacent bank at issue in this proceeding.

10. In or about 1980, the Borough of Stroudsburg conveyed the aforesaid permanent easements to the Commonwealth.

11. Third party defendants are "owners" and "operators", as those terms are used in Section 197(a) of CERCLA, 42 U.S.C. §9607(a), of the Brodhead Creek stream bed and the adjacent bank at issue in this proceeding.

12. Third party defendants, together with other persons, negligently caused, or contributed to, the discharge of coal tar into Brodhead Creek by, *inter alia*:

(a) Causing the excavation of portions of the earthen barrier between the coal tar and Brodhead Creek;

(b) Erecting dikes and levees on the bank of Brodhead Creek thereby causing, *inter alia*, downcutting of the stream bed and bank; and

(c) Improperly maintaining the stream bed and bank.

13. Although Union Gas Company denies that such allegations are true, and that such allegations are sufficient to state a claim against Union Gas Company, the allegations made by plaintiff against Union Gas Company are properly made against the third party defendants.

14. In the event the plaintiff proves that Union Gas Company is liable on any of the counts of the Complaint, which liability is expressly denied,

then third party defendants are liable over to Union Gas Company for any and all damages that may be assessed against Union Gas Company.

WHEREFORE, Union Gas Company hereby demands that judgment be entered against third party defendants Commonwealth of Pennsylvania and Borough of Stroudsburg for any and all damages that may be awarded to and against Union Gas Company, and Union Gas Company further demands judgment for the costs of suit, and such other relief as may be proper.

August 1, 1983

/s/
DAVID H. MARION

/s/
ROBERT A. SWIFT
KOHN, SAVETT, MARION
& GRAF, P.C.
1214 IVB Building
Lawrence A. Demase 1700 Market Street
Rose, Schmidt,
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900 Oliver Bldg.
Pittsburgh, PA 15222
(412) 434-8600

Attorneys for third
party plaintiff,
Union Gas Company

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF :
AMERICA, :
Plaintiff :
v. :
UNION GAS COMPANY, :
Defendant and :
Third Party : CIVIL ACTION
Plaintiff : NO. 83-2456
v. :
COMMONWEALTH OF :
PENNSYLVANIA and :
THE BOROUGH OF :
STROUDSBURG, :
Third Party :
Defendants :
v. :
THIRD PARTY DEFENDANT, COMMONWEALTH
OF PENNSYLVANIA'S MOTION TO
DISMISS THIRD PARTY COMPLAINT

Third party Defendant, Commonwealth of Pennsylvania, by its attorney, Marc G. Brecher, Deputy Attorney General, hereby requests this Honorable Court to dismiss the Third Party Complaint filed against it with prejudice. This Motion is presented to

the Court pursuant to Rule 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure and the following reason:

This Court lacks jurisdiction over the Third Party Complaint against the Commonwealth of Pennsylvania as a result of the Eleventh Amendment to the United States Constitution.

Respectfully submitted,

LeROY S. ZIMMERMAN
Attorney General

BY: /s/
Marc. G. Brecher
Deputy Attorney General

Office of Attorney General
206 State Office Building
Philadelphia, PA 19130
(215)351-2402

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF : CIVIL ACTION
AMERICA : NO. 83-2456
v. :
UNION GAS COMPANY :
:

ORDER

AND NOW, TO WIT, this 28th day of October, 1983, IT IS ORDERED that the motion of third-party defendant, Commonwealth of Pennsylvania, to dismiss the third party complaint as to it is granted and all claims against the Commonwealth of Pennsylvania are dismissed. The Court's Opinion will be filed in due course.

/s/

LOUIS C. BECHTLE, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF :
AMERICA, : CIVIL ACTION
Plaintiff :
v. : NO. 83-2456
:
UNION GAS COMPANY, :
Defendant :

AMENDED COMPLAINT

Plaintiff, the United States of America, pursuant to the authority of the Attorney General and at the request of the administrator of the United States Environmental Protection Agency, alleges that:

1. This is a civil action brought by the United States against Union Gas Company (Defendant) under Sections 104 and 107 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9604 and 9607, Sections 311(b)(3) and 311(f)(2) of the Clean

Water Act, 33 U.S.C. § 1321(b)(3) and (f)(2), and Section 7003 of the Resource Conservation and Recovery Act, ("RCRA"), 42 U.S.C. § 6973, for the recoupment of costs incurred to date in responding to the release and threatened release of oil, hazardous substances and solid wastes into the environment, specifically, Brodhead Creek, a navigable water of the United States, from the facility owned and operated by Defendant in Stroudsburg, Pennsylvania.

2. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 1345, 42 U.S.C. § 6973, 9607 and 9613, and 33 U.S.C. § 1321(n). Venue is proper in this district because Defendant resides and has its principal office in this district and is doing business here, 28 U.S.C. § 1331(c), and 42 U.S.C. § 9613(b).

DEFENDANT

3. Union Gas Company is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania.

4. The terms "Defendant", "Union Gas Company", and "Union Gas" as they appear in this complaint to refer to the Union Gas Company as it presently exists and to all companies of which Union Gas is a successor in interest or an assign.

5. Union Gas Company is the corporate successor to Citizens Gas Company. Defendant currently owns and operates a plant for the distribution of natural gas at 203 Main Street Stroudsburg, Pennsylvania.

6. For more than fifty years from at least 1890 to 1948, Defendant operated a carburetted water gas coal

gasification plant at 203 Main Street, Stroudsburg, Pennsylvania. The coal gasification plant produced coal gas from anthracite coal and transmitted it to local homes and business and generated wastes, including tars, oils, particulates and ash.

7. Defendant disposed of the wastes, including coal tar and oils, on the 203 Main Street premises and properties continuous thereto by dumping it on the surface, dumping it into pits and injecting it through wells into subsurface levels.

8. Coal tar and oil wastes generated by Defendant have reached the groundwater under the 203 Main Street site and migrated into Brodhead Creek, a navigable water of the United States.

9. Coal tar and oils have migrated and, absent appropriate remedial action, will continue to migrate toward Brodhead Creek. This migration constituted a release and a substantial threat of future release of coal tar and oils into Brodhead Creek.

10. Certain constituents of coal tar including acenaphthene, ethyl benzene, flouranthene, phenanthrene, and pyrene, are designated as toxic pollutants pursuant to Section 307(a) of the Clean Water Act (CWA), 33 U.S.C. § 1317(a). Naphthalene, xylene, and benzene, also found in coal tar, are designated as hazardous substances pursuant to Section 311(b)(2)(A) of the CWA, 33 U.S.C. § 1321(b)(2)(A). 40 C.F.R. § 116.4.

11. Coal tar contains creosote oil the sludge of which is hazardous under Section 3001 of RCRA, 42 U.S.C. § 6921, 45 Fed. Reg. § 261.32 (May 19, 1980). Coal tar is a solid waste under RCRA.

12. Substances listed pursuant to Sections 307 and 311 of CWA and Section 3001 of RCRA are "hazardous substances" under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).

13. Coal tar has been found in Brodhead Creek, in the groundwater under and surrounding the Union Gas facility, and in pits and borings on and surrounding the Union Gas facility.

FIRST CLAIM FOR RELIEF
- SUPERFUND (CERCLA)

14. The allegations contained in paragraphs 1 through 13 are realleged.

15. Section 104 of CERCLA, 42 U.S.C. § 9604, provides in pertinent part:

104(a)(1) - Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare, the President is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time (including its

removal from any contaminated natural resource), or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment, ...

104(b) - Whenever the President is authorized to act pursuant to subsection (a) of this section, or whenever the President has reason to believe that a release has occurred or is about to occur, or that illness, disease or complaints thereof may be attributable to exposure to a hazardous substance, pollutant, or contaminant and that a release may have occurred or be occurring, he may undertake such investigations, monitoring, surveys, testing, and

other information gathering as he may deem necessary or appropriate to identify the existence and extent of the release or threat thereof, the source and nature of the hazardous substances, pollutants or contaminants involved, and the extent of danger to the public health or welfare or of the environment. In addition, the President may undertake such planning, legal, fiscal, economic, engineering, architectural, and other studies or investigations as he may deem necessary or appropriate to plan and direct response action, to recover the costs thereof, and to enforce the provisions of the Act.

16. The Administrator of the Environmental Protection Agency is the President's delegate under Section 104(a) and (b) of CERCLA, 42 U.S.C. § 9604(a) and (b), as provided for in Section 2(e) of E.O. No. 12316, 46 Fed. Reg. 42237 (August 14, 1981).

17. Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), provides, in pertinent part:

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section -

- (1) the owner and operator of ... a facility,
- (2) any person who at the time of disposal of any hazardous substance owned or operated

any facility at which such hazardous substances were disposed of,

* * *

(4)shall be liable for -
(A) all costs of removal or remedial action incurred by the United States Government... not inconsistent with the national contingency plan

18. Section 101(9) of CERCLA, 42 U.S.C. § 9601(9), defines "facility" to include:

(B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located

19. The Union Gas site is a facility within the meaning of Section 101(9) of CERCLA, 42 U.S.C. § 9601(9) and an onshore facility within the meaning of 33 U.S.C. 1321(a).

20. Defendant Union Gas is a person as defined by Section 101(22) of the Act, 42 U.S.C. § 9601(22).

21. Section 101(14) of CERCLA, 42 U.S.C. § 9601(14), defines "hazardous substance" to include:

(A) any substance designated pursuant to, Section 311(b)(2)(A) of the Federal Water Pollution

Control Act, (B) any element, compound, mixture, solution, or substance designated pursuant to Section 102 of this Act, (C) any hazardous waste having the characteristics identified under or listed pursuant to Section 3001 of the Solid Waste Disposal Act... (D) any toxic pollutants listed under Section 307(a) of the Federal Water Pollution Control Act, ...

22. The materials identified in paragraphs 10 and 11 of this complaint are hazardous substances within the meaning of § 101(14) of CERCLA, 42 U.S.C. § 9601(14).

23. Section 101(22) of CERCLA, 42 U.S.C. § 9601(22), defines "release" as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging,

injecting, escaping leaching, dumping, or disposing into the environment..."

24. Prior to the response measures of the Administrator described in paragraph 29, releases from the Union Gas facility into the environment had occurred, were continuing to occur, and were threatening to occur within the meaning of Section 101(22) of CERCLA, 42 U.S.C. § 9601(22).

25. Defendant Union Gas Company engaged in operation of the Union Gas facility at the time of disposal of coal tar and other hazardous substances at the facility. Defendant is within the class of persons described as being liable under Section 107(a)(1) and (2) of CERCLA, 42 U.S.C. § 9607(a)(1) and (2).

26. Section 101(25) of CERCLA, 42 U.S.C. § 9601(25) defines "response" to mean "remove, removal, remedy, and remedial action."

27. Section 101(23) of CERCLA, 42 U.S.C. § 9601(23) defines "remove" or "removal," in pertinent part, as:

... the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such action as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal or removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or

welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access . . . , action taken under 104(b) of this Act...

28. Section 101(24) of CERCLA, 42 U.S.C. § 9601(24), defines "remedy" or "remedial action," in pertinent part, as:

those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of

hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment....

29. The Administrator, after demand upon Union Gas, to which Union Gas failed to respond, has undertaken response measures not inconsistent with the National Contingency Plan concerning the release and threatened release of hazardous substances and oils from the Union Gas facility. These measures include, *inter alia*, the dredging of the back channel of Brodhead Creek and the installation of a slurry wall.

30. The United States has incurred response costs to date in excess of \$720,000, in responding to the release and threatened release of hazardous substances from the Union Gas

facility. The United States continues to incur costs.

31. The Defendant is liable to the United States for all costs, including the costs of removal and remedial actions and enforcement, that the United States has incurred in responding to the release and threatened release of hazardous substances from the Union Gas facility. Plaintiff has demanded reimbursement but Defendant has refused and continues to refuse to pay plaintiff.

SECOND CLAIM FOR RELIEF
- CLEAN WATER ACT

33. Plaintiff realleges paragraphs 1-32.

34. Defendant owns and operates an on shore facility as that term is defined under 33 U.S.C. § 1321.

35. Brodhead Creek, and the surrounding wetlands which are regularly or periodically inundated, are "navigable waters" of the United States.

36. Defendant discharged oil and hazardous substances into and upon Brodhead Creek, and/or adjoining shorelines and wetlands.

37. The discharge of oil by defendant, as set forth in the preceding paragraph, was in "harmful quantities", as that term is used in 33 U.S.C. § 1321, in violation of 33 U.S.C. § 1321(b)(3).

38. Union Gas Company was the operator and owner and is presently the owner of an on shore facility, from which there was a discharge, and a substantial threat of discharge of oil, into or upon the navigable waters of the United States, and adjoining shorelines

and wetlands, in violation of 33 U.S.C. § 1321(b)(3).

39. The United States, by its duly designated officer, acted to "remove" or "arrange for the removal of", as defined in 33 U.S.C. § 1321(a)(8), (c) such oil set forth in the preceding paragraph.

40. The costs incurred by the United States to perform the work set forth in the preceding paragraph are in an amount exceeding \$720,000. Plaintiff has demanded this sum from defendant, but defendant has failed and refused to pay said sum. Defendant is liable to plaintiff pursuant to 33 U.S.C. § 1321(f)(2).

Respectfully submitted,

/s/
EDWARD S. G. DENNIS, JR.
United States Attorney

/s/
ALEXANDER EWING, JR.
Assistant United States
Attorney

/s/
JAMES G. SHEEHAN
Assistant United States
Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF
AMERICA, :
Plaintiff :
v. :
UNION GAS COMPANY, :
Defendant and :
Third Party :
Plaintiff :
v. :
COMMONWEALTH OF :
PENNSYLVANIA and :
THE BOROUGH OF :
STROUDSBURG, :
Third Party :
Defendants :
v. :
CIVIL ACTION :
NO. 83-2456 :
JURY TRIAL :
DEMANDED :
v.

ANSWER TO AMENDED COMPLAINT

Defendant, Union Gas Company,
answers the Amended Complaint filed by
plaintiff as follows:

1. Admitted only that plaintiff
so asserts.
2. Admitted, except it is
denied that this Court has jurisdiction
pursuant to 42 U.S.C. § 6973.
3. Admitted.

4. Admitted only that plaintiff so asserts. Defendant expressly denies liability of any assignor or predecessor in interest.

5. Admitted in part and denied in part. It is denied that Union Gas Company is the corporate successor to Citizens Gas Company. It is admitted that defendant currently owns and operates a business at 203 Main Street, Stroudsburg, Pennsylvania engaged in distributing natural gas.

6. Denied as stated. From 1890 to 1948, when it was dismantled, the predecessors to defendant operated a carburetted water gas plant at 203 Main Street, Stroudsburg, Pennsylvania. Typical solid wastes produced during the processing of coal by a carburetted water gas plant are tars, oils, ashes and particulates. The quantities and characteristics of the tars and oils

produced depend on the properties of the coal feedstock and the time-temperature profile of the coal in the gasifier. The commercial gas produced from the carburetted water gas plant was sold to homes and businesses in Stroudsburg.

7. Denied.

8. Denied.

9. Denied.

10. Denied.

11. Denied.

12. Admitted, except that substances exempt from the definition of "hazardous substances" under the Resource Conservation and Recovery Act are also exempt under from the definition of "hazardous substance" under Section 101(14) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), and coal tar is so exempt.

13. Denied. By way of further answer, plaintiff violated Section 104(e)(1)(B) of CERCLA, 42 U.S.C. § 9604(e)(1)(B) by failing to give defendant one half of all samples taken or a receipt for all samples taken.

14. Defendant incorporates herein its answers to paragraphs 1 through 13 of the Amended Complaint.

15. Admitted that the Section is correctly quoted in part, but the quotation is misleading in that it omits the following pertinent proviso:

"unless the President determines that such removal and remedial action will be done properly by the owner or operator of the vessel or facility from which the release or threat of release emanates, or by any other responsible party."

16. Admitted.

17. Admitted only that the Section is correctly quoted.

18. Admitted only that the Section is correctly quoted.

19. Denied.

20. Denied.

21. Admitted that the Section is correctly quoted in part, but the quotation is misleading in that it omits the following proviso:

"(but not including any waste the regulation of which under the Solid Waste Disposal Act has been suspended by Act of Congress)"

22. Denied.

23. Admitted only that the Section is correctly quoted in part.

24. Denied.

25. Denied.

26. Admitted only that the Section is correctly quoted in part.

27. Admitted only that the Section is correctly quoted in part.

28. Admitted only that the Section is correctly quoted in part.

29. Denied.

30. Denied.

31. Denied.

[32] [Sic]

33. Defendant incorporates herein its answers to paragraphs 1 through 31 of the Amended Complaint.

34. Admitted that at present, defendant owns and operates an "onshore facility" within the meaning of 33 U.S.C. § 1321, which definition excludes land. By way of further answer, coal tar and oil were never released or discharged from this onshore facility

which was first constructed in the 1950's.

35. Admitted.

36. Denied.

37. Denied.

38. Denied.

39. Denied.

40. Denied.

WHEREFORE, defendant Union Gas Company prays that this Court dismiss the Amended Complaint.

Second Defense

41. The Amended Complaint fails to state a cause of action upon which relief can be granted.

Third Defense

42. The Amended Complaint must be dismissed for plaintiff's failure to join parties known to plaintiff that are indispensable to the just adjudication of this litigation.

Fourth Defense

43. The retroactive application of the statutes and regulations relied on by plaintiff violates defendant's right to due process of law and the United States Constitution's proscription against ex post facto laws.

44. The averred release or discharge took place prior to the enactment of the statutes relied upon by plaintiff, and those statutes are not retroactive in application.

Fifth Defense

45. Coal tar is a by-product of the processing of coal and is exempt from the definition of "hazardous substance" by virtue of 42 U.S.C. § 6921 (a)(3)(A). Therefore, coal tar and its

constituents are exempt from the definition of "hazardous substance" under 42 U.S.C. § 9601(14).

Sixth Defense

47. No reportable or harmful quantity of oil or a hazardous substance has been released or discharged.

48. The alleged oil sheen caused no actual or measurable harm.

Seventh Defense

49. Defendant is not liable for the recoupment of costs incurred by the United States in responding to the averred release or discharge into Brodhead Creek because the release or discharge was caused by the intervening negligent acts and omissions of the United States Army Corps of Engineers, the Commonwealth of Pennsylvania, the

Borough of Stroudsburg and other third parties acting in concert with them over whom defendant exercised no control.

Eighth Defense

50. The United States is estopped from recouping the costs incurred by it in responding to the averred release or discharge into Brodhead Creek, since the release or discharge was caused in whole or in part by the intervening negligent acts and omissions of the United States Army Corps of Engineers and its agents, employees and contractors over whom defendant exercised no control.

Ninth Defense

51. Defendant has exercised due care in the circumstances. The averred release and discharge results from the acts, omissions and/or negligence of the United States Army

Corps of Engineers, the Commonwealth of Pennsylvania, Borough of Stroudsburg and other third parties acting in concert with them and the consequences of these acts could not have been reasonably foreseen and provided against by the defendant.

Tenth Defense

52. Plaintiff has failed to mitigate its alleged damages.

53. The United States is barred from recouping the incurred costs sought by the Amended Complaint because its response was: (a) unnecessary and inappropriate for the actual problem involved; (b) inconsistent with the national contingency plan; (c) not based upon a reasonable assessment of the potential for injury from the asserted

release; (d) not cost effective; and (e) not proximately caused by the alleged release and discharge.

54. The United States is barred from recouping incurred costs sought by the Amended Complaint because (a) it failed to make an adequate determination of whether the averred release presented an imminent and substantial danger to the public health or welfare, and (b) the proposed remedial plan of a property owner, Pennsylvania Power and Light Company, would have abated the alleged release without further action or expense by the United States.

Eleventh Defense

55. Alternatively, even if it is determined that defendant is liable for the costs incurred and those costs were necessary and appropriate under the

circumstances and consistent with the national contingency plan, then defendant is not liable for the entire amount of the response costs, but only its aliquot share based on the ownership and operation of the coal gasification plant and adjacent real estate by others and the acts, omissions and negligence of the United States Corps of Engineers, the Commonwealth of Pennsylvania, the Borough of Stroudsburg and others, and other relevant factors.

WHEREFORE, defendant Union Gas Company prays that the Amended Complaint be dismissed.

August 9, 1984

/s/

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Attorneys for Union
Gas Company

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF	:	
AMERICA,	:	
Plaintiff	:	
v.	:	
UNION GAS COMPANY,	:	
Defendant and	:	
Third Party	:	CIVIL ACTION
Plaintiff	:	NO. 83-2456

COMMONWEALTH OF
PENNSYLVANIA and
THE BOROUGH OF
STROUDSBURG,
Third Party
Defendants

AMENDED THIRD PARTY COMPLAINT

1. Third party plaintiff is Union Gas Company, the defendant in the above action.

2. Third party defendant, the Commonwealth of Pennsylvania (the "Commonwealth"), is a sovereign political entity which has as two of its agencies the Department of General Services ("DGS") and the Department of Environmental Resources ("DER").

3. The Commonwealth is subject to the jurisdiction and venue of this Court in that sovereign immunity has been legislatively waived by virtue of 42 Pa. C.S. § 8522(b)(4).

4. The Borough of Stroudsburg is a political subdivision of the Commonwealth of Pennsylvania with its principal place of business in Stroudsburg, Monroe County, in the Eastern District of Pennsylvania.

Cause of Action

5. On or about May 23, 1983, the plaintiff United States of America commenced the above action against Union Gas Company. On or about May 25, 1984, the United States served Union Gas with an Amended Complaint, a true and correct copy of which is attached hereto as Exhibit "A".

6. The Amended Complaint alleges that defendant unlawfully released and discharged coal tar and oil into Brodhead Creek in Stroudsburg, Pennsylvania.

7. The United States has alleged that between 1890 and 1948 coal tar was dumped into pits adjacent to Brodhead Creek.

8. Between 1960 and 1962, at the request and with the assistance and approval of the U.S. Army Corps of Engineers, the Commonwealth, acting through DGS and DER, and the Borough of Stroudsburg, relocated the Brodhead Creek stream channel.

9. In or about 1960, the Borough of Stroudsburg received permanent easements over the portion of Brodhead Creek and its adjacent bank at issue in this proceeding.

10. In or about 1980, the Borough of Stroudsburg conveyed the aforesaid permanent easements to the Commonwealth.

11. Third party defendants are "owners" and "operators", as those terms are used in Section 197(a) of CERCLA, 42 U.S.C. § 9607(a), of the Brodhead Creek stream bed and the adjacent bank at issue in this proceeding.

12. Third party defendants caused the alleged release and discharge of coal tar and oil into Brodhead Creek by their acts, omissions and/or negligence including, inter alia:

(a) The narrowing of the channel of Brodhead Creek on its western side and restriction of the channel with dikes thereby causing significant downcutting;

(b) Excavating along the toe of the dike and backwater areas; and

(c) Failing to take corrective measures to prevent the downcutting.

13. Although Union Gas Company denies that the United States' allegations are true, or that such allegations are sufficient to state a claim against Union Gas Company, the allegations made by the United States against Union Gas Company are properly made against the third party defendants.

14. In the event the United States proves that Union Gas Company is liable on any of the counts of the Amended Complaint, which liability is expressly denied, then third party defendants are liable over to Union Gas Company, on the basis of subrogation or otherwise, for any and all damages that may be assessed against Union Gas Company.

WHEREFORE, Union Gas Company hereby demands that judgment be entered against third party defendants Commonwealth of Pennsylvania and Borough of Stroudsburg for any and all damages that may be awarded against Union Gas Company, and Union Gas Company further demands judgment for the costs of suit, and such other relief as may be proper.

August 9, 1984

/s/

DAVID H. MARION
ROBERT A. SWIFT
KOHN, SAVETT MARION &
GRAF, P.C.

Lawrence A. Demase 1214 IVB Building
Rose, Schmidt, 1700 Market Street
Dixon & Hasley Phila., PA 19103
900 Oliver Bldg. (215) 665-9900
Pittsburgh, PA 15222

(412) 434-8600 Attorneys for third
 party plaintiff,
 Union Gas Company

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF	:
AMERICA,	:
Plaintiff	:
v.	:
UNION GAS COMPANY,	:
Defendant and	:
Third Party	:
Plaintiff	:
v.	:
COMMONWEALTH OF	:
PENNSYLVANIA and	:
THE BOROUGH OF	:
STROUDSBURG,	:
Third Party	:
Defendants	:

COMMONWEALTH OF PENNSYLVANIA'S
MOTION TO DISMISS OR IN THE
ALTERNATIVE MOTION TO STRIKE THE
AMENDED THIRD PARTY COMPLAINT

Third Party Defendant, Commonwealth of Pennsylvania by its attorney, Marc G. Brecher, Deputy Attorney General, hereby moves this Court pursuant to Rules 12(b)(1), 12(b)(6) and 12(f) of the Federal Rules of Civil Procedure to either dismiss or strike the amended third party complaint filed against it.

This Motion is based upon the following reasons and the attached Memorandum of Law.

1. On May 23, 1983, the United States of America brought suit against the Union Gas Company (UGC) under §§ 104 and 107 of the Comprehensive Environmental Response Compensation Act (CERCLA), 42 U.S.C. §§ 9604 and 9607 and §§ 311(b)(3) and 311(f)(2) of the Clean Water Act, 33 U.S.C. § 1321(b)(3) and 1321(f)(2).

2. On August 3, 1983, the UGC filed a third party complaint against the Commonwealth of Pennsylvania and the Borough of Stroudsburg.

3. On or about August 9, 1983, the Commonwealth of Pennsylvania filed a motion to dismiss the third party complaint.

4. On October 28, 1983, this Court entered an Order "that the motion of the third party defendant, Commonwealth of Pennsylvania to dismiss the third party complaint as to it is granted and all claims against the Commonwealth of Pennsylvania are dismissed."

5. In a memorandum dated November 15, 1983 in support of its Order of October 28, 1983, this Court held that the third party complaint was barred by the Eleventh Amendment to the United States Constitution.

6. On August 13, 1984, the Commonwealth of Pennsylvania was served with an "Amended third party complaint" filed against it and the Borough of Stroudsburg by UGC. This pleading is virtually identical to the initially filed third party complaint which this

Court dismissed as to the Commonwealth of Pennsylvania in the Order of October 28, 1983.

7. Third party defendant, Commonwealth of Pennsylvania presently moves this Court to either dismiss or strike the third party complaint filed against it for the reasons set forth in the following paragraphs.

8. The Amended third party complaint should be dismissed for the same reasons articulated by the Court in its Memorandum of November 15, 1983 which the Commonwealth of Pennsylvania incorporates by reference herein.

9. Alternatively, the amended third party complaint, should be stricken pursuant to Rules 12(f) and 15(a) of the

Federal Rules of Civil Procedure since it was filed without leave of court.

LeROY S. ZIMMERMAN
ATTORNEY GENERAL

BY: /s/
MARC G. BRECHER
Deputy Attorney General

OFFICE OF ATTORNEY GENERAL
206 State Office Building
Philadelphia, PA 19130
Telephone: (215) 351-2402

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	:	
Plaintiff	:	
v.	:	
UNION GAS COMPANY,	:	
Defendant and	:	
Third Party	:	CIVIL ACTION
Plaintiff	:	NO. 83-2456
v.	:	
COMMONWEALTH OF	:	
PENNSYLVANIA and	:	
THE BOROUGH OF	:	
STROUDSBURG,	:	
Third Party	:	JURY TRIAL
Defendants	:	DEMANDED

DEFENDANT'S ANSWER TO THE
COMMONWEALTH'S MOTION TO DISMISS OR
STRIKE THE AMENDED THIRD PARTY COMPLAINT

1 through 4 Admitted.

5. Denied as stated. The Court ruled that it lacked jurisdiction over the Commonwealth as to the causes of action alleged on the basis of the Eleventh Amendment to the United States Constitution.

6. Denied as stated. It is admitted that the Commonwealth was served with the Amended Third Party Complaint; however, the Amended Third Party Complaint differs in some respects from the original Third Party Complaint.

7. Admitted that the Commonwealth so moves.

8. Denied.

9. Denied.

WHEREFORE, defendant Union Gas Company prays that this Court deny the Commonwealth's Motion to Dismiss or strike the Third Party Complaint.

August 22, 1984

DAVID H. MARION
ROBERT A. SWIFT
KOHN, SAVETT, MARION &
GRAF, P.C.
1214 IVB Building
1700 Market Street
Phila., PA 19103
(215) 665-9900

Attorneys for Union Gas
Company

Of Counsel:

Lawrence A. Demase
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900 Oliver Building
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(412) 434-8600

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF :
AMERICA, :
v. :
UNION GAS COMPANY, : CIVIL ACTION
v. : NO. 83-2456
COMMONWEALTH OF :
PENNSYLVANIA and :
THE BOROUGH OF :
STROUDSBURG, :

ORDER

AND NOW, TO WIT, this 13th day
of September, 1984, upon motion of the
Commonwealth of Pennsylvania to dismiss,
IT IS ORDERED that the motion is granted
and the amended third-party complaint
filed by the Union Gas Company is
dismissed for the reasons set forth in
this court's Memorandum dated November
15, 1983.

/s/
LOUIS C. BECHTLE, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF
AMERICA,
v.

UNION GAS COMPANY,

CIVIL ACTION
NO. 83-2456

THE BOROUGH OF
STROUDSBURG,

ORDER

AND NOW TO WIT: this 4th day of February, 1985, it having been reported that the issues between the parties in the above action have been settled and upon Order of the Court pursuant to the provisions of Rule 23(b) of the Local Rules of Civil Procedure of this Court (effective January 1, 1970), it is ORDERED that the above action is DISMISSED with prejudice, pursuant to

agreement of counsel without costs except as provided by Local Rule 42(d).

MICHAEL E. KUNZ,
Clerk of Court

BY: /s/
Deputy Clerk

ENTERED: 2/4/85

REGISTER & RECORDER
MARCH 19, 1960
HONORABLE JUDGE THIRTY-THREE



77th day of March in the year of our Lord one thousand nine hundred eighty.

THE TOWN BOROUGH OF STRoudsBURG, a municipal corporation, is organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania, Grantor, party of the first part;

- and -

THE COMMONWEALTH OF PENNSYLVANIA, Grantee, party of the second part;

Witnesseth, That the said party of the first part, for and in consideration of the sum of One and 90/100 (\$1.00) Dollar lawful money of the United States of America, to the said party of the second part, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, has released and quieted, and by these presents, does release and quiet-claim unto the said party of the second part, and to its successors and assigns forever, all those certain lands, easements, rights-of-way, rights-of-entry as contained in the agreements hereinabove set forth.

1. Easement from Lester G. Abeloff and Clementine Abeloff, his wife, to the Borough of Stroudsburg et al dated March 14, 1960 and recorded in Deed Book Volume 266, Page 396.
2. Easement from Commissioners of Monroe County to the Borough of Stroudsburg et al dated March 14, 1960 and recorded in Deed Book Volume 266, Page 410.
3. Easement for Parcel 2 as more fully set forth in the Ordinance providing acquisition of easements and rights-of-way over lands along Brodheads and McMichaels Creek in the Borough of Stroudsburg as recorded on June 2, 1960 at Volume 267, Page 207 and said being tract 2 of parcel #2 as more fully set forth in the within recorded and described ordinance.
4. Easement from Pennsylvania Independent Oil Company, Inc. to the Borough of Stroudsburg et al dated March 14, 1960 and recorded in Deed Book Volume 266, Page 392.
5. Easement from Pennsylvania Power & Light Company to the Borough of Stroudsburg et al dated March 14, 1960 and recorded in Deed Book Volume 272, Page 39.
6. Easement from Shaw Insulator Company to the Borough of Stroudsburg dated March 14, 1960 and recorded in Deed Book Volume 267, Page 20.
7. Easement from Star Ribbon Corporation to the Borough of Stroudsburg dated March 14, 1960 and recorded in Deed Book Volume 267, Page 13.
8. Easement from Stroudsburg Municipal Authority to the Borough of Stroudsburg dated March 14, 1960 and recorded in Deed Book Volume 266, Page 413.
9. Easement from Stroudsburg Septic Tank Company to the Borough of Stroudsburg dated March 14, 1960 and recorded in Deed Book Volume 267, Page 53.

Together with all and singular the immovables and appurtenant thereto belonging, or in any wise appertaining, and the rents, issues, reverses, and profits therefrom; And also, all the rents, rights, title, interest, property, claim and demand whatever, as well as in law as in equity, of the said party of the first part, of her or to the abovesigned premises, and every part and parcel thereof, with the appurtenances thereto.

To have and to hold all and singular the abovesigned and aforesaid premises together with the appurtenances, unto the said party of the second part, its successors and assigns forever.

In witness whereof,

Sealed and Delivered |



BOROUGH OF STRoudSBURG

Karl Dickl, President

Witnessed, the day of the above Indenture, of the above-

I hereby certify that the complete post office and precise address of the
President Pennsylvania
Mail Office Bldg. Harrisburg, Pa.
Frank Hartman 7125

State of Pennsylvania
County of Monroe

On the 7th day of March 1890, before me

personally appeared the abovesigned
Borough of Stroudsbury,

and in due form of law acknowledged the above Indenture to be his
act and deed, and desired the same might be recorded as such.

Witness my hand and notarial
seal the day and
year aforesaid.



James B. Clancy
Commissioner, June 21, 1890

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APPENDIX I - ADDITIONAL NOTIFICATION INFORMATION

•

984

4. PAYMENT METHOD		<input checked="" type="checkbox"/> Advance <input type="checkbox"/> Retainer		<input checked="" type="checkbox"/> Letter of Credit <input type="checkbox"/> Type of Action	
5. AGREEMENT TYPE		6. PAYEE		7. TYPE OF ACTION	
Executive Agreement		Commonwealth of Pennsylvania Management Center, Las Vegas		New	
6. PAYEE		Treasurer Commonwealth of Pennsylvania Harrisburg, PA 17120			
7. RECIPIENT		8. RECIPIENT TYPE		9. RECIPIENT	
Commonwealth of Pennsylvania Dept. of Environmental Resources Box 2063 Harrisburg, PA 17120		Statewide		State Government	
9. TIN NO.		10. PROJECT NUMBER		11. PROJECT OFFICER AND TELEPHONE NO.	
231-7330-23A1		231-7330-23A1		Michael Steiner (717) 787-7383 Commonwealth of Pennsylvania Box 2063 Harrisburg, PA 17120	
12. ISSUING OFFICE (city/street)		13. EPA OFFICIAL FILE COPY		14. EPA PROJECT STATE OFFICER AND TELEPHONE NO.	
Washington, D.C.		RETURN AFTER SIGNATURE		Roy Schrock, Project Officer (215) 597-2711 Environmental Protection Agency Region III 6th and Walnut Streets Philadelphia, Pennsylvania 19106	
15. EPA CONGRESSIONAL LIAISON & TEL NO.		16. STATE APL 10 (Clearinghouse)		17. FIELD OF SCIENCE (if WWT CG Only)	
Ms. Pat Gaskins (202) 382-5195		N/A		99 <input checked="" type="checkbox"/> PROJECT STEP STEP 1 N/A	
18. STATUTORY AUTHORITY		19. REGULATORY AUTHORITY		20. STEP 2 + 3 & STEP 3 (WWT Construction Only) N/A	
P.L. 96-510		40 CFR Part 30		a. Treatment Level b. Pretreatment c. Treatment Process d. Sludge Disposal	
21. PROJECT TITLE AND DESCRIPTION "Pennsylvania Multi-site Cooperative Agreement" Cooperative Agreement for Pennsylvania to take the lead in Remedial Planning activities at National Priorities List Hazardous Waste Sites pursuant to CERCLA and the National Contingency Plan.					
22. PROJECT LOCATION / AREA Impacted by Project					
23. PROJECT FUNDING		24. PROJECT LOCATION / AREA Impacted by Project		25. COMMUNITY POPULATION (WWT CG)	
Statewide		Statewide		26. BUDGET PERIOD 2/9/84 - 6/8/86	
27. ASSISTANCE PROGRAM/CFDA PROGRAM NO. & TITLE		28. PROJECT PERIOD COST \$672,254		28. TOTAL PROJECT PERIOD COST \$672,254	
Superfund		29. FORMER AWARD		30. THIS ACTION \$672,254	
31. EPA AWARE THIS ACTION		32. AMENDED TOTAL			
33. EPA IN-LING ACCOUNT					
34. UNEXPENDED Prior Year Balance					
35. Other Federal Funds					
36. Resident Contribution					
37. State Contribution					
38. Local Contribution					
39. Other Contribution					
40. Alternative Project Costs					
See S.C. #5		41. PAYMENT		42. DEBT CONTROL NO.	
		43. ACCOUNT NUMBER		44. OBJECT CLASS	
		See S.C. #5		45. OBLIGATORIES/DEBTORS ACCOUNT	
See S.C. #5					

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TABLE A - OBJECT CLASS CATEGORY
(Non-Administrative)

1. PERSONNEL		\$194,354
2. FRINGE BENEFITS		74,146
3. TRAVEL		38,000
4. EQUIPMENT		-0-
5. SUPPLIES		3,000
6. CONTRACTUAL		326,000
7. CONSTRUCTION		-0-
8. OTHER		1,500
9. TOTAL DIRECT CHARGES		3637,000
10. INDIRECT COSTS RATE 1.513 % base		335,254
11. TOTAL (See: Recipient) 0 % Federal 100 %		\$672,254

12. TOTAL APPROVED ASSISTANCE AMOUNT See Special Condition No. 7

TABLE B - PROGRAM ELEMENT CLASSIFICATION
(Non-Administrative)

1.		
2.		
3.		
4.		
5.		
6.		
7.		
8.		
9.		
10.		
11.		
12. TOTAL (See: Recipient) 0 % Federal 100 %		

12. TOTAL APPROVED ASSISTANCE AMOUNT

TABLE C - PROGRAM ELEMENT CLASSIFICATION
(Construction)

1. ADMINISTRATION EXPENSE		
2. PRELIMINARY EXPENSE		
3. LAND STRUCTURES, RIGHT-OF-WAY		
4. ARCHITECTURAL ENGINEERING BASIC FEES		
5. OTHER ARCHITECTURAL ENGINEERING FEES		
6. PROJECT INSPECTION FEES		
7. LAND DEVELOPMENT		
8. RELOCATION EXPENSES		
9. RELOCATION PAYMENTS TO INDIVIDUALS AND BUSINESSES		
10. DEMOLITION AND REMOVAL		
11. CONSTRUCTION AND PROJECT IMPROVEMENT		
12. EQUIPMENT		
13. MISCCELLANEOUS		
14. TOTAL (Lines 1 thru 13)		
15. ESTIMATED INCOME (if applicable)		
16. NET PROJECT AMOUNT (Line 14 minus 15)		
17. LESS: INELIGIBLE EXPENSES		
18. ADD: CONTINGENCIES		
19. TOTAL (Lines: Recipient) 0 % Federal 100 %		
20. TOTAL APPROVED ASSISTANCE AMOUNT		

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PART II-APPROVED BUDGET

TABLE A - OBJECT CLASS CATEGORY

(Non-construction)

		ASSISTANCE IDENTIFICATION NUMBER	TOTAL APPROVED EXPENSES
1. PERSONNEL			
2. FRINGE BENEFITS			
3. TRAVEL	0		
4. EQUIPMENT	0		
5. SUPPLIES	\$ 9,500		
6. CONTRACTUAL	0		
7. CONSTRUCTION	0		
8. OTHER	\$ 9,500		
9. TOTAL DIRECT CHARGES	0		
10. INDIRECT COSTS: RATE	0 % BASE		
11. TOTAL (Line 9 plus Line 10)	\$ 9,500		
12. TOTAL APPROVED ASSISTANCE AMOUNT	\$ 9,500		

TABLE B - PROGRAM ELEMENT CLASSIFICATION (Non-construction)

1.			
2.			
3.			
4.			
5.			
6.			
7.			
8.			
9.			
10.			
11.			
12. TOTAL (Line 1 plus Line 2)	\$ 9,500	Federal	
13. TOTAL APPROVED ASSISTANCE AMOUNT	\$ 9,500	Federal	
TABLE C - PROGRAM ELEMENT CLASSIFICATION (Construction)			
1. ADMINISTRATION EXPENSE			
2. PRELIMINARY EXPENSE			
3. LAND STRUCTURES, RIGHT-OF-WAY			
4. ARCHITECTURAL ENGINEERING BASIC FEES			
5. OTHER ARCHITECTURAL ENGINEERING FEES			
6. PROJECT INSPECTION FEES			
7. LAND DEVELOPMENT			
8. RELOCATION EXPENSES			
9. RELOCATION PAYMENTS TO INDIVIDUALS AND BUSINESSES			
10. DEMOLITION AND REMOVAL			
11. CONSTRUCTION AND PROJECT IMPROVEMENT			
12. EQUIPMENT			
13. MISCELLANEOUS			
14. TOTAL (Lines 1 thru 13)			
15. ESTIMATED INCOME (if applicable)			
16. NET PROJECT AMOUNT (Line 14 minus 15)			
17. LESS INELIGIBLE EXCLUSIONS			
18. ADD: CONTINGENCIES			
19. TOTAL (Line: Recipient _____ \$ _____ Federal _____ \$ _____)			
20. TOTAL APPROVED ASSISTANCE AMOUNT			

PART III - AWARD CONDITIONS

a. GENERAL CONDITIONS:

The recipient covenants and agrees that it will expeditiously initiate and timely complete the project work for which assistance has been granted under this agreement, in accordance with all applicable provisions of 40 CFR Chapter I, Subpart B. The recipient warrants, represents, and agrees that it, and its contractor, subcontractors, employees and representatives, will comply with: (1) all applicable provisions of 40 CFR Chapter I, Subchapter B, INCLUDING BUT NOT LIMITED TO the provisions of Appendix A to 40 CFR Part 30, and (2) any special conditions set forth in this assistance agreement or any assistance amendment pursuant to 40 CFR 30.425.

b. SPECIAL CONDITIONS:

(For cooperative agreements include identification or summarization of EPA responsibilities that reflect or contribute to substantial improvement.)

1. The amount shown in block 13, Proposed Funding, of the State's application is \$4,776,254. The State agrees, however, that the amount to be funded at this time is the amount (\$672,254) shown in Section B, on page 5 of 10 of its application as the "Initial Grant". The State further understands that current EPA financial and program plans for future funding under this agreement anticipate amendments for several Remedial Investigations and Feasibility Studies (RI/FS). The EPA will evaluate the State's requests for those RI/FS projects, in light of the availability of funds and national priorities, as they are submitted. While EPA intends to provide funds for RI/FS projects, award of this Agreement does not commit or otherwise obligate EPA to provide such future funding.
2. Part of the funding for State costs under this Agreement relates to Remedial Investigations/Feasibility Studies (RI/FS's). The budget estimates for those costs are based on the preparation of eight (8) RI/FS's. Until this Agreement is amended to provide funding for RI/FS's, the State may draw down from the funds awarded only such amounts as are necessary to prepare for the procurement of the RI/FS contractor(s). When funds are made available, the State may draw down amounts for RI/FS coordination and management in proportion to the number of projects actually funded (e.g., if EPA provides funds for five (5) RI/FS's the State may use approximately sixty-five percent (65%) of the amount budgeted for management and coordination of RI/FS's). The State must receive written prior approval of the EPA Regional Site Project Officer to use funds in excess of such proportional amounts.
3. The award of this agreement is conditional upon receipt, with the State's acceptance of this agreement, of a Statement from the State's Governor or Attorney General that the Department of Environmental Resources (DER) has the authority to enter into and execute the terms of this Agreement.

4. The recipient agrees to the following conditions in accepting this cooperative agreement for the letter of credit method of financing:

- Cash disbursements will occur only when needed for disbursements.
- Timely reporting of cash disbursements and balances will be provided as required by the EPA Letter of Credit User's Manual.
- The same standards of timing and reporting will be imposed on secondary recipients, if any.
- When a drawdown under the letter of credit occurs, the recipient will show on the back of the voucher (Form TFS-5401) the Cooperative Agreement number, the appropriate EPA account number, and the drawdown amount applicable to each activity account (see attached "Instructions for Using the Superfund Account Number Under Cooperative Agreements"). The eighth digit of the account number (see item 39, page 1 of the Cooperative Agreement) is the code to the appropriate activity assignment:

L - Remedial Planning, consisting of the following subactivities:

- Remedial Investigation/Feasibility Study
- Remedial Design

A - Support and Maintenance

- When funds for a specific activity have been exhausted but the work under the activity has not been completed, the recipient may not draw down from another activity or site account without written permission from the EPA Project Officer and Award Official.
- Funds remaining in an account after completion of an activity may either be recycled to the EPA or adjusted to another activity or site at EPA's discretion.
- When a subactivity is completed, the recipient will submit a Financial Status Report (Standard Form 269) within 90 days to the EPA Project Officer.

Failure on the part of the recipient to comply with the above conditions may cause the unobligated portions of the letter of credit to be revoked and the financing method changed to a reimbursable basis.

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5. Fiscal information for this award is as follows:

<u>Site</u>	<u>P.E.</u>	<u>FY</u>	<u>Appropriation</u>	<u>DCN</u>	<u>Account #</u>	<u>Obt. Class</u>	<u>Obligation</u>
DER	TPAYA	84	68/20X8145	E2B020	4TPA722A00	41.83	\$346,254
Dortney	TPAYA	84	68/20X8145	E2E024	4TPA723L86	41.83	\$ 34,500
Benderston	TPAYA	84	68/20X8145	E2E027	4TPA723LA3	41.83	\$ 34,500
E. Mt. Zion	TPAYA	84	68/20X8145	E2E025	4TPA723L98	41.83	\$ 34,500
Berks	TPAYA	84	68/20X8145	E2E022	4TPA723L64	41.83	\$ 34,500
Voortman	TPAYA	84	68/20X8145	E2E031	4TPA723LA1	41.83	\$ 34,500
Walsh	TPAYA	84	68/20X8145	E2E032	4TPA723L87	41.83	\$ 34,500
Baldwin	TPAYA	84	68/20X8145	E2E021	4TPA723LA5	41.83	\$ 25,000
Letterkenny	TPAYA	84	68/20X8145	E2E028	4TPA723LA2	41.83	\$ 25,000
Modem	TPAYA	84	68/20X8145	E2E029	4TPA723LA4	41.83	\$ 25,000
Sunset	TPAYA	84	68/20X8145	E2E030	4TPA723L82	41.83	\$ 25,000
Brodhead	TPAYA	84	68/20X8145	E2E023	4TPA723L28	41.83	\$ 9,500
Havertown	TPAYA	84	68/20X8145	E2E026	4TPA723L54	41.83	\$ 9,500

6. The Director, Grants Administration Division, has approved a deviation from 40 CFR 30.308 which permits the recipient to charge allowable costs incurred on this budget period effective February 9, 1984, provided this agreement is accepted without change within three calendar weeks of its receipt. (See 40 CFR 30.305).

7. Recipient must comply with the budget breakdowns as provided in the one oversight and 12 site-specific budgets. Refer to pages 3 - 15.

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PART IV

E: The Agreement must be completed in duplicate and the Original returned to the Grants Administration Division for Headquarters awards and to the appropriate Grants Administrations Office for State and local awards within 3 calendar weeks after receipt or within any extension of time as may be granted by EPA.

Receipt of a written refusal or failure to return the properly executed document within the prescribed time, may result in the withdrawal of the offer by the Agency. Any change to the Agreement by the recipient subsequent to the document being signed by the EPA Award Official which the Award Official determines to materially alter the Agreement shall void the Agreement.

OFFER AND ACCEPTANCE

United States of America, acting by and through the U.S. Environmental Protection Agency (EPA), hereby offers assistance/amendment to the _____
100 % of all approved costs incurred up to and not exceeding \$ 672,254 _____
ASSISTANCE AMOUNT

the support of approved budget period effort described in application (including all application modifications) cited in Item 22 of this Agreement, submitted 2/2/84 _____
TYPE AND DATE

ISSUING OFFICE (Grants Administration Office)

AWARD APPROVAL OFFICE

ORGANIZATION/ADDRESS	Office of Solid Waste & Emergency Response Environmental Protection Agency Washington, D.C. 20460
----------------------	---

THE UNITED STATES OF AMERICA BY THE U.S. ENVIRONMENTAL PROTECTION AGENCY

TYPE OR PRINT NAME AND TITLE _____
Richard DeBenedictis, Grants Operations Branch (RN-216) DATE FEB 9 1984

Agreement is subject to applicable U.S. Environmental Protection Agency statutory provisions and assistance provisions. In accepting this award or amendment and any payments made pursuant thereto, (1) the undersigned certifies that he is duly authorized to act on behalf of the recipient organization, and (2), the recipient agrees that the award is subject to the applicable provisions of 40 CFR Chapter I, Subchapter B and of the provisions of this Agreement (Parts I thru IV), and (b) that acceptance of any payments constitutes an agreement by the payee that the amounts, if any found by EPA to have been overpaid will be refunded or credited in full to EPA.

BY AND ON BEHALF OF THE DESIGNATED RECIPIENT ORGANIZATION

TYPE NAME AND TITLE	NICHOLAS DEBENEDICTIS	DATE
---------------------	-----------------------	------

ENVIRONMENTAL RESOURCES

PAGE 19

106a

Approved as to Legality and Form: Com. Secy.


D. J. T. J. M.
Assistant Attorney General

Date


J. C. Mull
Chief, Assistant Counsel
Department of Environmental Resources

Approved:


2/7/84
Date

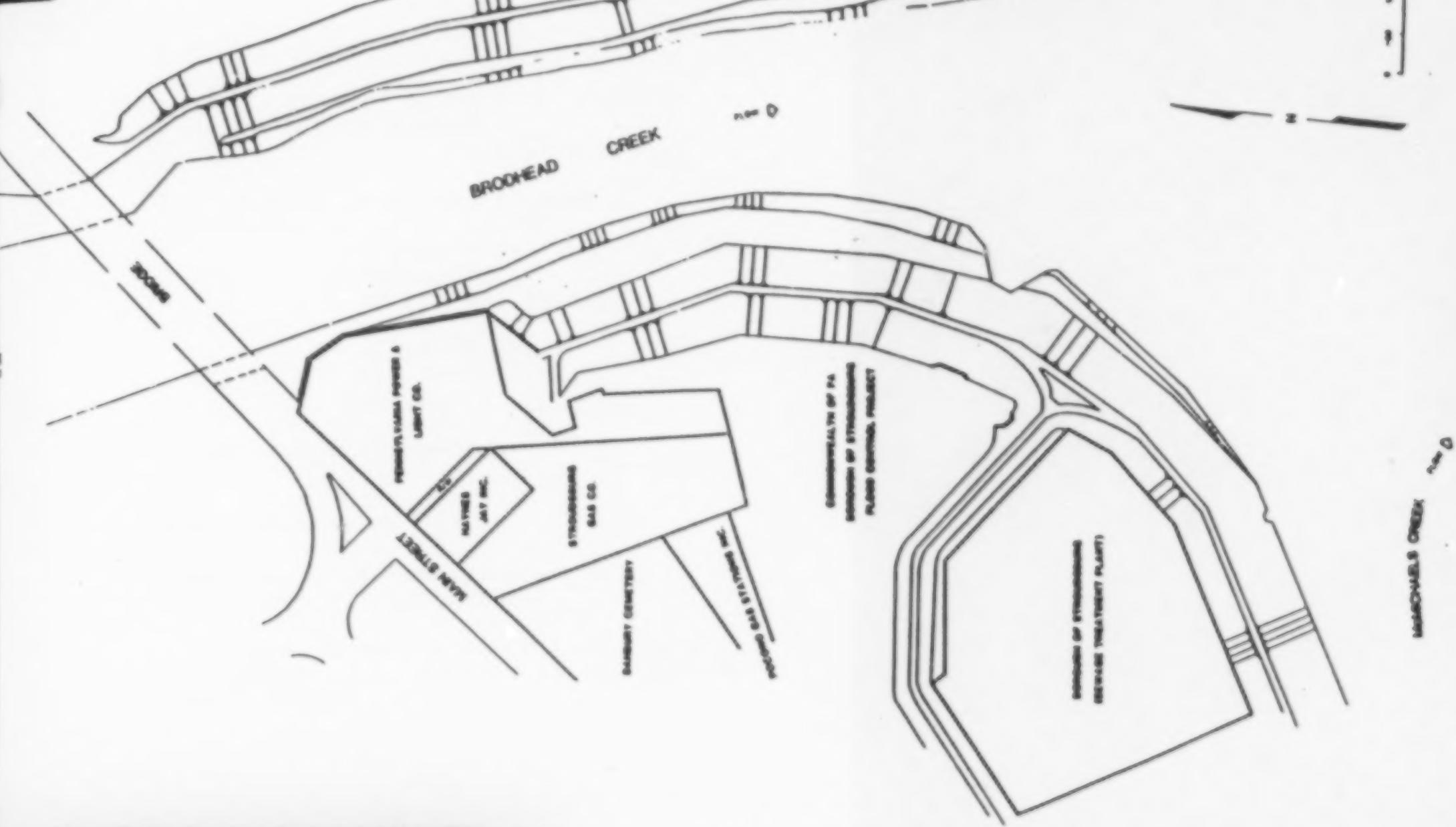
N. H.
Secretary of Budget and Administration

I hereby certify that funds in the amount of _____ are available under Appropriation.

N. H.
Comptroller

Date

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NOTICE OF APPEAL
TO
U.S. COURT OF APPEALS, THIRD CIRCUIT

U.S. DISTRICT COURT Eastern/Pennsylvania
(DISTRICT/STATE)

Philadelphia
(LOCATION)

U.S. TAX COURT ()

CIRCUIT COURT
DOCKET NUMBER _____
(leave blank)

FULL CAPTION IN DISTRICT COURT
AS FOLLOWS:

DISTRICT OR
TAX COURT
DOCKET NO. 83-2457

DISTRICT OR
TAX COURT
JUDGE_____

United States of America

vs.
Union Gas Company
vs.
Commonwealth of Pennsylvania and
The Borough of Stroudsburg

Notice is hereby given that Union
Gas Company appeals to the United
(Named Party)

States Court of Appeals for the Third
Circuit from (x) Judgment () Order ()
Other (Specify) _____

entered in
this action on February 4, 1985.
(Date)

DATED:

See sheet attached
Counsel for Appellant - Signature

Name of Counsel - Typed

Address

Tel. No. - U.S. Gov't FTS or Other

See sheet attached
Counsel for appellee

Address

Tel. No. - U.S. Gov't FTS or Other

NOTE: USE ADDITIONAL SHEETS if all
appellants and/or all counsel
for appellees cannot be listed
on the Notice of Appeal sheet.

109a(a)

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(4)
No. 87-1241

Supreme Court, U.S.
FILED
MAY 26 1988
JOSEPH F. SPANION, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1987

COMMONWEALTH OF PENNSYLVANIA,

Petitioner

v.

UNION GAS COMPANY,

Respondent

On Writ Of Certiorari
To The United States Court of Appeals
For The Third Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether amendments to a definitional section of the Superfund Act, which make no mention of the Eleventh Amendment and which refer to State liability only in narrow circumstances not applicable here, contain the unmistakable expression of Congressional intent necessary to override the Eleventh Amendment?

2. Whether Congress, acting under the Commerce Clause, may affect the States' Eleventh Amendment immunity only if States waive their immunity by continuing to operate in the federally regulated sphere?

3. Whether a State may be found to have knowingly and voluntarily waived its Eleventh Amendment immunity because, years earlier, it operated in what later became a federally regulated sphere?

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IN THE SUPREME COURT OF
THE UNITED STATES

OCTOBER Term, 1987

No. 87-1241

COMMONWEALTH OF PENNSYLVANIA,

Rehabilitation Act Amendments
of 1986, Pub. L. 99-506,
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Reauthorization Act of 1986,
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Petitioner

v.

UNION GAS COMPANY,

Respondent

MISCELLANEOUS

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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

OPINIONS BELOW

The second opinion of the Court
of Appeals (Pet. App. 1a-73a) is
reported at 832 F.2d 1343 (1987). The
first opinion of the Court of Appeals
(Pet. App. 74a-138a) is reported at 792
F.2d 372 (1986). The opinion of the
District Court (Pet. App. 139a-158a) is
reported at 575 F.Supp. 949 (1983).

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on November 3, 1987, and the petition for certiorari was filed within 90 days thereafter. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Eleventh Amendment to the United States Constitution provides:

"The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any Foreign state.

2. Section 101(b) of the Superfund Amendments and Reauthorization Act of 1986, Pub.L. No. 99-499, 100 Stat. 1613, 1615 (1986) ("SARA"), provides:

STATE OR LOCAL GOVERNMENT
LIMITATION -- Paragraph (20) of section 101 of CERCLA (defining "owner or operator") is amended as follows:

1) Add the following new subparagraph at the end thereof;

"(D) The term 'owner or operator' does not include a unit of State or local government which acquired ownership or control involuntarily through

bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign. The exclusion provided under this paragraph shall not apply to any State or local government which has caused or contributed to the release or threatened release of a hazardous substance from the facility, and such a State or local government shall be subject to the provisions of this Act in the same manner and to the same extent, both procedurally and substantively as any governmental entity, including liability under section 107."

2) Amend clause (iii) of subparagraph (A) to read as follows: "(iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated, or otherwise controlled activities at such facility immediately beforehand."

STATEMENT OF THE CASE

This case began with a complaint filed in the United States District Court for the Eastern District of Pennsylvania in which the United States sought to recover from Union Gas Co. the costs incurred to clean up coal tar which had seeped into a creek. Pet. App. 10a. Suit was brought pursuant to Sections 104 and 107 of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund), 42 U.S.C. §§9604, 9607. Pet. App. 10a. Union Gas filed third party claims against the Commonwealth of Pennsylvania and a Pennsylvania municipality, the Borough of Stroudsburg.¹ Pet. App. 10a, 79a.

¹The Borough is not a party to this appeal. Pet. App. 80a n.3.

The District Court dismissed the claim on Eleventh Amendment grounds.² Pet. App. 158a. Initially, the Court of Appeals affirmed (Pet. App. 118a), but following remand from this Court to reconsider the question in light of intervening amendments to CERCLA, the Third Circuit reversed. Pet. App. 73a.

1. The pleadings disclose that predecessors of Union Gas owned and operated a facility which produced coal tar as a by-product of its operation. Pet. App. 76a-77a. Long after the plant was closed the Commonwealth acquired portions of Union Gas' land and, through

²Following the dismissal, the United States filed an amended complaint, Union Gas filed a new third party claim, the Commonwealth moved to dismiss and the District Court dismissed the third party claim, relying on its initial opinion. Pet. App. 81a.

the Borough, also acquired easements near a creek for flood control. Pet. App. 9a, 76a-77a. In the 1950's, the State, together with the Army Corps of Engineers, dug levees, erected dikes and changed the flow of the creek to aid in flood protection. Pet. App. 77a. In October of 1980, the State again was engaged in excavation along the creek when coal tar began to seep into the water. Pet. App. 77a.

The Environmental Protection Agency (EPA) found that the coal tar was a hazardous substance thus triggering the protections of CERCLA. Pet. App. 77a. The Commonwealth in cooperation with federal authorities cleaned up the spill. Pet. App. 9a. After reimbursing the Commonwealth for its costs, the

United States sued Union Gas.³ Pet. App. 9a-10a.

The District Court concluded that the third party claim was barred by the Eleventh Amendment because CERCLA lacked clear language eliminating the States' immunity. Pet. App. 151a-152a. Following a settlement between the United States and Union Gas, Union Gas appealed dismissal of its third party claim. Pet. App. 11a.

2. In its first opinion, the Court of Appeals agreed with the District Court. The court found in CERCLA, as it read at that time, no clear language overturning Eleventh Amendment immunity. The legislative history similarly was

silent on the subject. The Court of Appeals affirmed.

3. Union Gas filed a petition for certiorari and soon thereafter CERCLA was amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986) (SARA). Eventually, the Court vacated the judgment of the Court of Appeals and remanded the case for reconsideration in light of SARA. Union Gas Co. v. Pennsylvania, No. 86-597 (January 12, 1987).

This time the Third Circuit discerned in SARA a clear Congressional intent to eliminate Eleventh Amendment immunity. Specifically, the court found that amendments to the definitional section of CERCLA, 42 U.S.C. §9601(20) (D), now made it plain that States are liable under the statute. Pet. App. 21a-23a. Aside from the language of

³The United States alleged that it had spent \$1,400,000 on the clean-up and sought recovery from Union Gas for \$720,000. Pet. App. 81a.

the amendments, the Court of Appeals found support for its conclusion in provisions eliminating the sovereign immunity of the United States and providing for citizens suits. Pet. App. 23a-28a.

Having resolved the statutory interpretation question, the Court of Appeals faced the question whether Congress had the power under the Commerce Clause to alter Eleventh Amendment protections. First, the court concluded that the extent of Congress' power to affect Eleventh Amendment immunity did not vary depending upon whether Congress was acting pursuant to its Article I powers or its power to enforce the Fourteenth Amendment. Pet. App. 66a. The court then decided that, so long as

Congress expressed itself clearly, there were no constraints on its ability to eliminate the Eleventh Amendment safeguards when it was acting under the Commerce Clause. Pet. App. 66a-67a. Finally, the court ruled that the SARA amendments could be applied retroactively because the case still was on appeal when the law was amended. Pet. App. 67a-72a.

The Court granted Pennsylvania's petition for certiorari on March 21, 1988.⁴

⁴The Court of Appeals stayed the mandate pending disposition of this petition.

SUMMARY OF ARGUMENT

1. The Court of Appeals erred in holding that in SARA Congress acted to eliminate the States' Eleventh Amendment immunity. Congress can do so only "by making its intention unmistakably clear in the language of the statute," Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985), but in SARA Congress did nothing of the kind. The language principally relied on by the Court of Appeals is far from clear, applies only in very limited circumstances, and even in those circumstances was intended to limit rather than expand government liability.

2. In any event, Congress, acting under the Commerce Clause, cannot unilaterally abrogate the Eleventh Amendment without some corresponding consent or waiver from affected States.

The cases, such as Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), permitting Congress to do so when it acts under § 5 of the Fourteenth Amendment, stand on a different footing. The Fourteenth Amendment was specifically designed as an expansion of federal power over the States; when Congress acts under its Fourteenth Amendment powers, it may do things which in other contexts would be constitutionally impermissible.

Outside of the Fourteenth Amendment, the concepts of State consent and waiver have always played a central part in the Court's Eleventh Amendment jurisprudence. The Court of Appeals' decision to dispense with these concepts, in favor of a rule that Congress can do whatever it wants as long as it makes its intentions clear, makes the Eleventh Amendment meaningless except as a rule of draftsmanship.

3. Pennsylvania has not waived its Eleventh Amendment immunity. Congress may induce States to waive their immunity by notifying them, in unmistakably clear language, that State operations within a federally regulated sphere will subject them to federal court jurisdiction; such State operations are then construed as State consent to such jurisdiction. But implied consent of this kind cannot by its nature be retroactive to a point before Congress spoke, for no State could then have known the consequences of its actions. In this case, the actions complained of occurred years before SARA was enacted, so that in no event can Pennsylvania be said to have waived its immunity.

ARGUMENT

I. CONGRESS DID NOT INTEND IN CERCLA TO ELIMINATE THE STATES' ELEVENTH AMENDMENT IMMUNITY.

The Court consistently has held that "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985); Welch v. Texas Department of Highways and Public Transportation, No. 85-1716 (June 25, 1987), slip op. at 8 ("abrogation of Eleventh Amendment immunity by Congress must be expressed in unmistakably clear language"). The Court of Appeals recognized that CERCLA, as originally enacted, contains no such "unmistakably clear language," Pet. App. 97a-105a, but erroneously found it in

the SARA amendments to CERCLA. Pet. App. 21a-31a.

CERCLA authorizes the President, in cooperation with the States, to clean up releases of hazardous waste and take other remedial action, 42 U.S.C. § 9604. Any "person" who is an "owner or operator" of a hazardous waste site is liable for the costs of the remedial actions taken, by the President or anyone else, 42 U.S.C. §§ 9601(20), 9607(a), and "person" as defined in the statute specifically includes States. 42 U.S.C. §§ 9601(21).

The Court of Appeals, in its first opinion in this case, correctly held that this was not enough to overcome the Eleventh Amendment. This Court has long held that the mere literal inclusion of the States among those to whom a statute applies does not suffice

to eliminate the States' Eleventh Amendment immunity. Atascadero, *supra*, 473 U.S. at 245-46; Employees of Dept. of Pub. Health & Welfare v. Missouri Dept. of Public Health & Welfare, 411 U.S. 279, 283-85 (1973). This is especially so where, as here and in Employees, the statute expressly authorizes actions by the United States. 42 U.S.C. § 9607(a) (1)(A); 411 U.S. at 285-86. The Eleventh Amendment does not, of course, bar actions against a State by the United States, United States v. Mississippi, 380 U.S. 128, 140-41 (1965), so that construing such a statute to preserve the States' Eleventh Amendment immunity does not make it meaningless. Employees, 411 U.S. at 285-86. Indeed, the Court of Appeals noted that in this respect CERCLA was "almost identical" to the statute at issue in Employees. Pet. App. 100a. The Court of Appeals thus

correctly concluded that, in enacting the original CERCLA, Congress had expressed no intention to eliminate the States' Eleventh Amendment immunity.

Nothing in the SARA amendments should have changed this result, for nowhere in SARA did Congress "unequivocally express this intention," *Atascadero, supra*, 473 U.S. at 243. SARA makes no explicit reference to the Eleventh Amendment and does not by its terms lift the bar of immunity.

The Court of Appeals, however, focused on SARA's amendment to the definition of "owner or operator" in 42 U.S.C. § 9601(20).⁵ Entitled "State or

Local Government Limitation" (emphasis added), the amendment excludes from the definition of "owner or operator"--and hence from liability--States or local governments which have acquired hazardous waste sites involuntarily, for example through abandonment. But this exclusion is not available if the government unit "caused or contributed to the release" of the hazardous waste. "[S]uch a State or local government," that is, one which has caused or contributed to a release from a site acquired involuntarily, is subject to liability. The Court of Appeals, fastening upon this exception to the exclusion, held that Congress had thereby expressed, with the unmistakable clarity required by this Court's decisions, an intention to eliminate the States' Eleventh Amendment immunity.

⁵The text of the amendment is reproduced in full at p. 3-4 of this brief. It is contained in Section 101(b) of Pub. L. No. 99-499, 100 Stat. 1613, 1615 (1986), and is codified at 42 U.S.C.A. § 9601(20)(D) (West Supp. 1988).

The Court of Appeals was mistaken. Two things are clear about this rather convoluted provision. One is that it deals entirely with the limited circumstance of hazardous waste sites that are acquired by governments involuntarily; the other is that it was intended to limit the liability of those governments, not expand it. Nothing in the words of the statute or its legislative history suggests that Congress intended to do anything more, and certainly nothing suggests that Congress even considered the Eleventh Amendment in connection with this amendment. Cong. Rec. S11619 (daily ed. Sept. 17, 1985)(remarks of Sens. Stafford and Bentson); H.R. Conf. Rep. No. 962, 99th Cong., 2d Sess., 186-86, reprinted in 1986 U.S. Code Cong. and Adm. News 3276, 3278-79.

The Court of Appeals was able to reach the opposite result only by wrenching the last clause of the amendment ("such a State or local government shall be subject to... liability") away from the rest. Pet. App. 22a-23a. Considering this clause in isolation, the Court of Appeals concluded that Congress intended to eliminate the States' immunity from private federal lawsuits in all situations where a State "caused or contributed to the release" of hazardous waste. *Ibid.*

There are several problems with this approach. First, of course, is the violence that it does to the words of the statute. The clause at issue was obviously not intended to stand alone, but with the rest of the amendment which it modifies. Second, by reading this clause in isolation, the Court of Appeals

has effectively eliminated strict liability for State and local governments in all circumstances, even where the United States is a plaintiff. There is no evidence that Congress intended such a sweeping change; to the contrary, SARA's legislative history confirms that liability would continue to be "strict, that is, without regard to fault or wilfulness." H.R. Rep. No. 99-253(I) 99th Cong., 2d Sess., 74, reprinted in 1986 U.S. Code Cong. & Adm. News 2835, 2856.

Finally, and most importantly, the language relied on by the Court of Appeals does nothing, from an Eleventh Amendment perspective, to alter CERCLA as originally enacted. CERCLA, even after SARA, is still exactly like the statute considered in *Employees; States*

are literally included among the potential defendants, but the presence of the United States as a potential plaintiff, and the absence of any indication of a clear intention to eliminate Eleventh Amendment immunity precludes any such construction of the statute.

The Court of Appeals, to bolster its conclusion, relied on the similarity between the language of the last clause of the amendment and the language of Section 9607(g), waiving the sovereign immunity of the United States. Pet. App. 23a-24a; citing 42 U.S.C. § 9607(g). This similarity, reasoned the Court of Appeals, shows Congress' intention now to eliminate the immunity of the States as it had already eliminated that of the federal government. This reasoning, however, founders first on the fact that, as shown above, the amendment has

no broad application, and second on the fact that the amendment expressly applies not just to States but to local governments as well. Local governments, of course, do not partake of the States' Eleventh Amendment immunity, and their inclusion in a statute which, in the Court of Appeals' reading, was specifically designed to eliminate that immunity is inexplicable.

As if realizing that its reading needed still further support, the Court of Appeals looked finally to the amendment to Section 9659, which allows citizen suits under CERCLA, but only "to the extent permitted by the eleventh amendment." Pet. App. 29a-31a, citing 42 U.S.C.A. § 9659(a)(1)(West Supp. 1988). The Court of Appeals held that the recognition of Eleventh Amendment immunity for citizen suits necessarily

implies that it has been eliminated for other suits, and found this reading to be "perfectly reasonable." App. 31a.

In its first opinion, however, the Court of Appeals endorsed an alternative reading, which it also described as "perfectly reasonable," namely, that this provision had simply been copied from analogous provisions in other statutes, and was not intended to imply the general unavailability of Eleventh Amendment immunity. Pet. App. 117a-118a, n. 19. The Court of Appeals gave no reason for this astonishing about-face, but this matters little. A statute which admits of two "perfectly reasonable" but inconsistent interpretations hardly speaks with the unmistakable clarity required by this Court's Eleventh Amendment decisions.

The Court of Appeals' canvassing of the statute for hints and shades of meaning is itself evidence that its analysis has gone astray. When Congress has truly focused its attention on the Eleventh Amendment, it has had no difficulty making its intentions clear. At the same time that Congress was enacting SARA, it was also enacting the Rehabilitation Act Amendments of 1986, Pub. L. 99-506, 100 Stat. 1807 (1986).⁶ Responding to the Court's decision in *Atascadero*, *supra*, this Act provides that "[a] State shall not be immune under the Eleventh Amendment from suit in Federal court for a violation of [enumerated statutes]." Pub. L. 99-506, § 1003(a)(1), 100 Stat. at 1845. In

light of the perfectly straightforward language of the Rehabilitation Act Amendments, it is absurd to suppose that in SARA Congress chose to accomplish the same thing by following the tortuous route picked out by the Court of Appeals. The plain fact is that neither CERCLA, nor the SARA amendments to it, contains the "unmistakably clear language" required by the Court's decisions. The Court should therefore reverse the Court of Appeals.

⁶SARA was signed by the President on October 17, 1986, and the Rehabilitation Act Amendments five days later, on October 21.

II. CONGRESS, ACTING UNDER THE COMMERCE CLAUSE, MAY NOT UNILATERALLY ABROGATE THE ELEVENTH AMENDMENT.

If the Court holds that in SARA and CERCLA Congress did not express an unmistakable intention to eliminate the States' Eleventh Amendment immunity, the Court of course need go no further. If the Court rejects this position, however, it then becomes necessary to decide the nature and extent of Congress' power to do so. Specifically, the question is whether Congress, acting under the Commerce Clause, may abrogate the Eleventh Amendment unilaterally, that is, without any corresponding waiver or consent on the part of affected States.

The Court recently has declined to decide this question in advance of the necessity, Welch v. Texas Department of Highways and Public Transportation,

slip op. at 6; County of Oneida, New York v. Oneida Indian Nation, 470 U.S. 226, 252 (1985), but the correct answer has long been foreshadowed. The Court's Eleventh Amendment decisions repeatedly have emphasized the central role of State consent or waiver. See, e.g., Atascadero State Hospital v. Scanlon, 473 U.S. at 239-40; Edelman v. Jordan, 415 U.S. 651, 672 (1974); Monaco v. Mississippi, 292 U.S. 313, 329 (1934). This has been particularly true in cases involving statutes enacted, like this one, under Congress' Commerce Clause powers.

Thus, in Parden v. Terminal Ry. Co., 377 U.S. 184 (1964), the Court concluded that the Eleventh Amendment was not a bar to federal jurisdiction under the Federal Employees' Liability Act, 45 U.S.C. § 51 et seq., because

Congress conditioned the right to operate a railroad in interstate commerce upon amenability to suit in federal court as provided by the Act; by thereafter operating a railroad in interstate commerce, Alabama must be taken to have accepted that condition and thus to have consented to suit.

Id. at 192. The Court explained that Congress may not at its whim make the Eleventh Amendment disappear. "It remains the law that a State may not be sued by an individual without its consent. . . . Alabama, when it began operation of an interstate railway . . . necessarily consented to suit . . ."

*Ibid.*⁷

⁷The particular result in *Parden* was overruled by *Welch v. Texas Department of Highways and Public Transportation*. The Court did not, however, overrule *Parden*'s discussion of the need for State consent. The Court, instead, reserved the question. *Id.*, slip op. at 6.

The idea that a Commerce Clause statute can eliminate Eleventh Amendment immunity only if a State can be said to have waived it by engaging in federally regulated conduct was reinforced in *Employees of Dept. of Pub. Health & Welfare v. Missouri Dept. of Pub. Health & Welfare*, *supra*. The Court noted that Congress certainly has the power to determine that activities conducted by the States have such an effect on interstate commerce as to call for a uniform national approach. *Id.* at 284. But it must appear clearly "that Congress conditioned the operation of these [State] facilities on the forfeiture of immunity from suit in a federal forum." *Id.* at 285.

Pennsylvania submits that the approach taken in *Parden* and *Employees* remains correct, and that the notion of State consent or waiver remains an essential part of any Eleventh Amendment

analysis involving a Commerce Clause statute. The Court of Appeals, however, held that Congress unilaterally may empower the federal courts to hear private actions against States whether the States consent or not, and that, provided Congress makes its intentions clear, the Eleventh Amendment does not limit Congress' power to do so. The Court of Appeals was mistaken.

1. The most glaring defect in this holding is that it drains the Eleventh Amendment of all meaning except as a rule of draftsmanship, a result that would surely have outraged the Amendment's framers. The story of the Eleventh Amendment's adoption has often been retold by the Court, e.g., Welch v. Texas Department of Highways and Public Transportation, slip op. at 10-16. The

familiar elements of that story--the concern expressed during the ratification debates, by both supporters and opponents of the Constitution, that unconsenting States not be subject to suit in the federal courts; the national uproar over the Court's decision to the contrary in Chisholm v. Georgia, 2 Dall. 419 (1793); and the "speed and vigor" with which the Nation responded by adopting the Eleventh Amendment, Welch, slip op. at 15-16, n. 17--need no re-telling here.

It is simply inconceivable, in light of this history, that its framers could have intended that the protection the Eleventh Amendment gives to States should be voidable at the whim of Congress. To paraphrase Justice Bradley:

"Suppose that Congress, when proposing the Eleventh Amendment, had appended to it a proviso that nothing therein contained should prevent [Congress, by statute, from abrogating it]: can we imagine that it would have been adopted by the States? The supposition that it would is almost an absurdity on its face."

Hans v. Louisiana, 134 U.S. 1, 15 (1890).

The whole point of the amendment process of Article V of the Constitution is to enable the people to put certain legal principles beyond the reach of temporary majorities in the federal legislature. It is thus anomalous to suggest that Congress can override a constitutional amendment designed to limit the power of the federal government. If such a thing were suggested of any other constitutional provision--say, any of the

protections contained in the Bill of Rights--no one would seriously entertain it for a moment.

2. The Court of Appeals sought support for its holding, however, in the idea that State consent to federal jurisdiction is inherent in the constitutional plan. "By assenting to federal authority to regulate commerce, the states necessarily surrendered their sovereignty over that area," Pet. App. 62a, and thus necessarily consented to suit in federal court with respect to Commerce Clause statutes. Pet. App. 60a-65a; see Welch v. Texas Dept. of Highways and Public Transportation, slip op. at 6, n. 5.

This argument confuses the power of Congress under the Commerce Clause with the "judicial power of the United States" under Article III, and

ignores the century-old teaching of the Court in Hans v. Louisiana, supra, and other cases. Certainly, the States by ratifying the Constitution surrendered to Congress the right to regulate commerce, but they did not thereby subject themselves to federal judicial power. "The truth is, that the cognizance of suits and actions [against unconsenting States] was not contemplated by the Constitution when establishing the judicial power of the United States." Hans, 134 U.S. at 15, 16. As the Court put it in Ex parte New York, No. 1, 256 U.S. 490, 497 (1921), "the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given...."

3. The Court of Appeals looked also to the Court's decisions involving the interplay between the Eleventh Amendment and the Fourteenth. In Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), the Court held that the Eleventh Amendment is "necessarily limited" by Congress' power under Section 5 of the Fourteenth Amendment "to enforce, by appropriate legislation, the substantive provisions of the Fourteenth Amendment." 427 U.S. at 456. "As a result, when acting pursuant to § 5 of the Fourteenth Amendment, Congress can abrogate the Eleventh Amendment without the States' consent." Atascadero State Hospital v. Scanlon, 473 U.S. at 238. The Court of Appeals reasoned that the Commerce Clause, like the Fourteenth Amendment, is a "plenary grant of constitutional authority," Pet. App. 43a, and refused to recognize any

relevant distinction between them. The Court of Appeals held that, at least as far as the Eleventh Amendment is concerned, one "plenary grant of constitutional authority" is like another; anything that Congress can do under the Fourteenth Amendment it can do also under the Commerce Clause.⁸ Pet. App.

34a-47a.

Fitzpatrick v. Bitzer, *supra*, itself refutes this reasoning. The Court in Fitzpatrick underlined the distinction between Congress' powers under the Fourteenth Amendment and its "plenary" powers under Article I:

⁸According to the Court of Appeals, the only difference is that Fourteenth Amendment statutes are reviewed under a relaxed standard that makes it easier to infer congressional intent to abrogate the Eleventh Amendment. Pet. App. 45a-47a.

When congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority.

427 U.S. at 456. The Fourteenth Amendment thus alters what would otherwise be the proper constitutional balance between federal and state governments. As the Court explained in a later decision,

Fitzpatrick stands for the proposition that principles of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments "by appropriate legislation." Those Amendments were specifically designed as an expansion of federal powers and an intrusion on state sovereignty.

City of Rome v. United States, 446 U.S. 156, 179 (1980).

It is for this reason that Congress, acting under Section 5 of the Fourteenth Amendment, may "provide for private suits against States or state officials which are constitutionally impermissible in other contexts." Fitzpatrick v. Bitzer, 427 U.S. at 156. It is likewise the reason why the Court, in Commerce Clause and other contexts outside of the Fourteenth Amendment, has routinely searched for evidence of State consent to federal court jurisdiction--a search which would be entirely superfluous if the Court of Appeals' reasoning were correct. See, e.g., Atascadero State Hospital v. Scanlon, 473 U.S. at 246-47; Edelman v. Jordan, 415 U.S. 651, 672 (1974); Parden v. Terminal Ry. Co., 377 U.S. at 192. The Court of Appeals' holding thus can draw no support from the Court's Fourteenth Amendment decisions.

4. Nor is the Court of Appeals' holding necessary to protect Congress' power to regulate commerce. The Court of Appeals believed that Congress' power could be protected only by sweeping away any real constitutional protections for the States, Pet. App. 56a-57a, but such a radical approach is hardly necessary.

The Court has always been able to accommodate the competing interests that are inherent in a federal system without sacrificing the preeminence of federal law as the "supreme law of the land," U.S. Const., Art. VI, § 2, on the one hand, or the residual sovereignty of the States on the other. See Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 104-106 (1984). Thus, a federal court may not entertain an action

against a State, nor order monetary relief against a State treasury, Edelman v. Jordan, 415 U.S. at 663, but nevertheless may vindicate "the supreme authority of the United States" by awarding an injunction ordering State officials to conform their future conduct to the requirements of federal law. Ex parte Young, 209 U.S. 123, 160 (1908). Similarly, the United States may vindicate its authority by bringing its own action, to which the Eleventh Amendment is no bar, against a State. United States v. Mississippi, *supra*.

Finally, as the Court has many times recognized, States may waive their Eleventh Amendment immunity, and Congress may act to induce such waivers. To this subject the petitioner now turns.

III. PENNSYLVANIA HAS NOT WAIVED ITS ELEVENTH AMENDMENT IMMUNITY

The Eleventh Amendment concepts of consent and waiver, as developed in Parden, Employees, Edelman and Atascadero, properly accommodate Congressional power exercised under Article I with the States' historic immunity. Congress, despite the Eleventh Amendment, retains the power to regulate State activities and subject the States which operate within the federally regulated domain to federal court jurisdiction. To accomplish this, Congress must make its intentions known with unmistakable clarity. Atascadero State Hospital v. Scanlon, 473 U.S. at 243.

The clear statement rule serves two purposes. First, it insures that Congress consciously has focused on the question of State immunity and resolved

it in favor of subjecting States to federal court jurisdiction. Welch v. Texas Department of Highways and Public Transportation, slip op. at 8. Secondly, consistent with "the fundamental rule of jurisprudence" that a State may not be sued without its consent," Ex Parte New York No. 1, 256 U.S. 490, 497 (1921), the clear statement requirement preserves the States' freedom of choice. The States are notified that they may maintain their sovereign protection by steering clear of the federally regulated sphere; but, if they engage in activities which Congress has chosen to regulate, the States are deemed to have consented to federal court jurisdiction. See Edelman v. Jordan, 415 U.S. at 672-673.

In this case, Pennsylvania never had a choice. The events complained of occurred between 1960 and 1980, J. App. 83a-85a, but the law purporting to eliminate State immunity was not passed until 1986. It is obviously impossible to square these events with any reasonable idea of consent or waiver on Pennsylvania's part. An implied waiver, predicated on clear notice to the affected party, by its very nature can never be retroactive to some point before the notice was given.

Therefore, even if the Court should hold that in SARA Congress spoke with unmistakable clarity, that would be entirely insufficient to subject Pennsylvania to federal court jurisdiction in this case, for events that occurred

before Congress spoke. For this reason also, the Court should reverse the decision of the Court of Appeals.

CONCLUSION

For the foregoing reasons, the petitioner asks the Court to reverse the judgment of the Court of Appeals.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

COMMONWEALTH OF PENNSYLVANIA, Petitioner

vs.

UNION GAS COMPANY, Respondent

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QUESTIONS PRESENTED

1. Whether CERCLA's language unmistakably expresses Congress' intention to abrogate Eleventh Amendment immunity?
2. Whether the Eleventh Amendment precludes federal courts from asserting jurisdiction only in diversity of citizenship cases between a defendant state and a citizen of a different state?
3. Whether Article I of the Constitution empowers Congress to abrogate state immunity to private lawsuits?
4. Whether state consent to suit is a prerequisite to congressional abrogation?

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**In the Supreme Court
of the United States**

OCTOBER TERM, 1987

COMMONWEALTH OF PENNSYLVANIA, Petitioner

vs.

UNION GAS COMPANY, Respondent

BRIEF FOR RESPONDENT

**CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED**

1. United States Constitution, Amendment XI:

The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or subjects of any Foreign State.

2. United States Code, 42 U.S.C. §§9601(21) and 9607(a), P.L. No. 96-510, 94 Stat. 2767 [Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980 ("CERCLA")]:

9601(21) 'person' means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission,

political subdivision of a State or any interstate body;

9607(a) ... any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of, ... shall be liable for ... any other necessary costs of response incurred by any other person consistent with the national contingency plan. . . .

3. United States Code, 42 U.S.C. §9601(20)(D) and 9620(a)(1), P.L. No. 99-499, 100 Stat. 1613 [Superfund Amendments and Reauthorization Act of 1986 ("SARA")]:

9601(20)(D) The term "owner or operator" does not include a unit of State or local government which acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign. The exclusion provided under this paragraph shall not apply to any State or local government which has caused or contributed to the release or threatened release of a hazardous substance from the facility, and such a State or local government shall be subject to the provisions of this Act in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 107.

9620(a)(1) In general.—Each department, agency, and instrumentality of the United States (including the executive, legislative, and judicial branches of government) shall be subject to, and comply with, this Act in the same manner and to the same extent, both

procedurally and substantively, as any non-governmental entity, including liability under section 107 of this Act. Nothing in this section shall be construed to affect the liability of any person or entity under sections 106 and 107.

STATEMENT OF THE CASE

The sudden release of coal tar into Brodhead Creek in Stroudsburg, Pennsylvania in October 1980 caused the United States to declare the site the nation's first emergency Superfund site. A map of the site is contained in the Joint Appendix at J.A. 108. Adjacent to the stream from 1890 to 1948 in an industrial section of Stroudsburg had been a carburetted water gas plant which produced coal gas as well as its by-product, coal tar. While some constituents of coal tar are now defined as hazardous substances under CERCLA (J.A. 51), the EPA regards in-ground disposal of coal tar as state of the art technology during the first part of this century (see EPA Amended Fund Authorization Report). The plant was dismantled in 1948 and replaced successively by propane and natural gas distribution systems. The Company operating the plant changed ownership several times before being merged into respondent in 1978.

Between 1960 and 1962 the State rechanneled, narrowed and deepened Brodhead Creek and erected a dike on its sides. The Borough of Stroudsburg and later the State obtained a permanent easement or fee title to much of the site. (J.A. 98-99) The rechannelization of this fast flowing stream started a process of downcutting of the stream bed and erosion of the toe of the dike that led to the release of coal tar during the period that the State was an owner and operator of the site. It was during repairs to the toe of the dike that coal tar was first discovered. Between April 1981 and January 1982, the United States did a cleanup of the site at an alleged expense of \$967,000.00. The United States contended that there was a continuing release and threat of release of coal tar

which was not abated until the cleanup was complete. (J.A. 50) In 1984, Pennsylvania entered into a Multi-Site Cooperative Agreement with the United States covering the Brodhead Creek site whereby Pennsylvania agreed to take the lead in continuing remedial activities under the authority and funding of CERCLA. (J.A. 100-107)

The United States commenced this lawsuit on May 23, 1983 in the United States District Court for the Eastern District of Pennsylvania to recover its cleanup costs pursuant to CERCLA and the Clean Water Act, 33 U.S.C. §§1321(b)(3) and (f)(2), naming respondent as the sole defendant. (J.A. 5) Respondent filed a third-party complaint naming the Commonwealth of Pennsylvania and the Borough of Stroudsburg as third party defendants alleging that they were owners and operators of a facility at the site within the meaning of CERCLA, 42 U.S.C. §9601(20)(A), and, together with others, negligently caused or contributed to the release of coal tar. (J.A. 37)

The State moved to dismiss the third-party complaint under Fed. R. Civ. P. 12(b)(1) and 12(b)(6) alleging that it was immune to suit under CERCLA pursuant to the Eleventh Amendment to the Constitution. The district court granted the State's motion. (J.A. 45) Thereafter, the United States filed an amended complaint revising its damage claim, and respondent filed an amended third-party complaint. (J.A. 46 and 81) The State again moved to dismiss, and the district court granted the motion for the reasons set forth in its earlier opinion. (J.A. 95)

As a result of a settlement reached among the United States, respondent and the Borough of Stroudsburg whereby respondent paid a major portion of the cost of cleanup, the district Court dismissed the action. (J.A. 96) Respondent then appealed the district court's dismissal of Pennsylvania as a defendant to the United States Court of Appeals for the Third Circuit. A two member majority of the Third Circuit affirmed the district court's order, with the Honorable A. Leon Higginbotham filing a vigorous dissent concluding that CERCLA

clearly abrogated states' Eleventh Amendment immunity. (Pet. App. 74a)

On October 17, 1986, shortly after respondent filed a petition for certiorari with this Court, the President signed into law SARA, which amended CERCLA. At the urging of respondent herein and the United States, which as amicus contended SARA "authorizes suits against states or local governments for liability or contribution when such entries caused or contributed to the release or threatened release of a hazardous substance," (Amicus Br. at 5-6) this Court granted certiorari, vacated the court of appeals' opinion, and remanded for consideration in light of SARA.

On remand, the court of appeals unanimously reversed the district court holding that the Eleventh Amendment does not bar suit against Pennsylvania. (Pet App. 1a) The court of appeals further held that (1) the language of CERCLA, as amended by SARA, clearly and explicitly abrogated state immunity, (2) Congress may, consistent with the Constitution, abrogate state immunity in an Article I enactment, and (3) CERCLA, as amended by SARA, applies retroactively to respondent's cause of action.

SUMMARY OF ARGUMENT

1. CERCLA, as amended by SARA, satisfies the clear statement rule by providing in unmistakable language Congress' intention to render states liable for damages to private parties. When Congress defines a "person" liable under section 107(a) to include a "state" and then provides that a state "shall be subject to the provisions of this Act in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section [107]," Congress' intention to abrogate states' immunity is unmistakably clear. A contrary interpretation would frustrate the carefully devised legislative scheme of this "comprehensive" legislation and hinder voluntary clean-

ups at a significant number of hazardous waste sites throughout the nation.

2. This Court should overturn *Hans v. Louisiana*. The Eleventh Amendment is a jurisdiction preclusion provision that prohibits federal courts from asserting jurisdiction only in diversity of citizenship cases between a defendant state and a citizen of a different state. State sovereign immunity is not embodied in the Eleventh Amendment or any other part of the Constitution. *Hans*' prohibition of federal court jurisdiction as to all private party actions against states is founded on misinterpretation of precedent and has led to a befuddling progeny of cases creating rules and exceptions. Overturning *Hans* will simplify Eleventh Amendment jurisprudence while causing only minor change in the results of past decisions of this Court.

3. Congress may abrogate state immunity from private suits for money damages pursuant to its Article I powers. Intrinsic to the design of the Constitution, the federal courts possess jurisdiction coextensive in scope with Congress' power to enact Article I legislation such as CERCLA. Textually, the Eleventh Amendment places no restriction on Congress. To secure enforcement of its enactments, Congress may properly abrogate state immunity from private lawsuits. A contrary result would force private parties like Respondent herein to pay for a state's wrongdoing.

4. State consent to suit is superfluous where, as in CERCLA, Congress abrogates state immunity to suit.

ARGUMENT

I. CERCLA'S LANGUAGE UNMISTAKABLY EXPRESSES CONGRESS' INTENTION TO ABROGATE ELEVENTH AMENDMENT IMMUNITY

A. The Purpose of CERCLA Is To Redress a Fester- ing National Environmental Problem

Following a decade or more of piecemeal environmental legislation that engendered more disputes and rulemaking

than cleanups, Congress in 1980 enacted CERCLA to provide a thorough-going framework for the cleanup of hazardous waste contamination. Earlier attempts to cleanup the environment proved difficult to enforce, were laced with statutory and regulatory exceptions, lacked sufficient funding and only controlled current, not past, contamination. The patchwork quilt of hazardous waste regulation in the Clean Air Act, 42 U.S.C. §7401 *et seq.*, the Clean Water Act, 33 U.S.C. §1251 *et seq.*, and the Resource Conservation and Recovery Act, 42 U.S.C. §3251 *et seq.*, lent neither focus nor muscle to a national cleanup policy. Importantly, each expressly preserved the states' Eleventh Amendment immunity. See 42 U.S.C. §7604; 33 U.S.C. §1365; 42 U.S.C. §6967.

CERCLA, by imposition of strict liability on the basis of past and present status and application to releases of hazardous substances no matter how small the quantities, represented a radical departure from prior law. CERCLA was intended as a comprehensive approach to the cleanup of the nation's pollution sites amid congressional apprehension of a pollution crisis. See *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 474 U.S. 494, 506 (1986).

A major objective of CERCLA was to encourage the voluntary cleanup of contamination sites. The statute and its legislative history emphasize the need for voluntary cleanup. See, e.g., 42 U.S.C. §9612(a); H. Rep. No. 96-1016, Part I, 96th Cong. 2d Sess. 5, reprinted in 1980 U.S. Code Cong. & Admin. News 6119, 6120 (purpose of bill is to "induce such persons voluntarily to pursue appropriate environmental response actions"). Congress recognized in 1980, as well as when CERCLA was amended by SARA in 1986, that the trust fund created by CERCLA to fund cleanups was grossly insufficient to pay the cost of all cleanups.¹ Both the cost of cleanup

1. See, e.g. Legislative History of the Comprehensive Environmental Response Compensation and Liability Act of 1980, P.L. 96-510, Vol. 1, p. 101 (Statement of Thomas C. Jorling, Assistant Administrator Water and

and the number of potentially responsible parties made voluntary cleanups difficult. To encourage voluntary cleanups, Congress provided a statutory incentive: the right to obtain restitution from responsible parties.

Congress authorized, in section 107(a) of CERCLA, a "person" to recover necessary costs of response from any other "person." Congress defined person in the broadest sense possible:

"person" means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, *State*, municipality, commission, political subdivision of a State or any interstate body. 42 U.S.C. §9601(21) (emphasis added)

The inclusion of states in the definition of person was no accident. Congress intentionally departed from the format of its three prior environmental enactments where it immunized states from liability. Under CERCLA all political entities, even the federal government, were potentially liable to any other person who incurred cleanup costs.

Congress was well aware of state ownership and operation of contamination sites when it enacted CERCLA. States and local governments have for decades played a major role in managing the disposal of hazardous substances and have often been owners and operators of such sites. Indeed, the EPA has estimated that over 16% of all contamination sites on the National Priorities List are currently owned or controlled by states and local governments. (Estimate provided by EPA

Waste Management, June 20, 1979), Vol. 2, p. 252 (Statement of Representative Rostenkowski; H. Rep. 99-253, Part 1, dated August 1, 1985, prepared to accompany H. Rep. 2817) ("EPA will never have adequate monies or manpower to address the problem itself . . . Congress must facilitate cleanups of hazardous substances by the responsible parties"); and Interim Report of the Surveys and Investigations Staff of House Committee on Appropriations, March 14, 1988 (SARA legislative history makes evident that Congress recognized that without a highly successful enforcement program, EPA would never achieve the objectives of SARA because EPA by itself could never secure the financial and human resources required to resolve the problems).

Office of Emergency and Remedial Response, July 1, 1988.) Some of these sites are infamous. For example, in Mason County, West Virginia, the West Virginia Ordnance site, originally a 8,000-acre ordnance works run by the U.S. Army during World War II, is currently owned and operated by West Virginia as a wildlife refuge and for hunting and fishing. Land and water in the refuge has been contaminated with chemicals used in the manufacture of trinitrotoluene (TNT). EPA, *Descriptions of Sites on Current National Priorities Lists*, October 1984, 548 (Dec. 1984). In Pennsylvania, a foul-smelling sulfurous black liquid discharging from an abandoned gas well is threatening use of the Presque Isle State Park, a major recreational area on Lake Erie. *Id.* at 459. In Hillsboro, Kentucky, there is an estimated 4.8 million cubic feet of waste containing radioactive material at a state owned 279-acre site. EPA, *Descriptions of Sites on Update No. 2 to National Priorities List*, Oct. 1984.

Thus, the inclusion of states within the definition of persons liable under CERCLA was essential to Congress' bold and innovative plan to rid the nation of hazardous waste contamination.

B. CERCLA's Language Satisfies the Clear Statement Rule

Beginning with the decision in *Employees v. Department of Public Health*, 411 U.S. 279 (1973), this Court has constructed what has come to be known as the "clear statement rule" for testing congressional abrogation of state immunity. The clear statement rule requires that Congress express its intention to abrogate the Eleventh Amendment "in unmistakable language in the statute itself." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 243 (1985). See also *Welch v. State Department of Highways and Public Transportation*, 107 S.Ct. 2941 (1987); *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984). A unanimous court of appeals in *Union Gas II* correctly applied this standard when it held that CERCLA, as amended by SARA, possesses "the requisite un-

mistakably clear language needed to abrogate the states' eleventh amendment immunity.² 832 F.2d at 1345 (Pet. App. 7)

In CERCLA, Congress abrogated state immunity in the most direct and logical manner: it defined a "person"-liable under section 107(a) to include a state. 42 U.S.C. §9601(21). Judge Higginbotham, dissenting in *Union Gas I*, explained:

When a statute in its definitional section declares unequivocally that the term "person" includes a "State, municipality, commission, political subdivision of a State, or any interstate body" 42 U.S.C. §9601(21) (emphasis added), the explicit language of Congress should not be disregarded where there is no legislative history suggesting that Congress did not mean what they said when they used the word "state." 792 F.2d at 383 (Pet. App. 119)

Judge Higginbotham went on to observe that courts should not assume that they have a better mastery of the English language than does Congress. Not to acknowledge that Congress meant to include states in the definition of "person" would require Congress to engage in unprecedented redundancy and repetition within the definition. As this Court observed in *United States v. California*, 297 U.S. 175, 186-187 (1936): "Language and objectives so plain are not to be thwarted by resort to a rule of construction whose purpose is but to resolve doubts and whose application in the circumstances would be highly artificial."

This Court's decision in *Employees* is not, as contended by Pennsylvania, dispositive of whether inclusion of "state" within the statutory definition satisfies the clear statement rule. At issue in *Employees* was whether a 1966 amendment to the definition of "employer" in the 1938 Fair Labor Standards Act (FLSA) sufficiently evidenced congressional intent to abrogate state immunity which the states had enjoyed for over 35 years. Since Congress had not made a coordinate

2. All other lower courts that have considered this issue have reached the same result as the Third Circuit: *Wickland Oil Terminals v. Asarco, Inc.*, 654 F.Supp. 955 (N.D.Cal. 1987); *United States v. Freeman*, 680 F.Supp. 73 (W.D.N.Y. 1988).

change in the FLSA's liability section and there was no other evidence in the statute or legislative history, this Court held the clear statement rule was not satisfied. CERCLA, by contrast, has other statutory indicia of congressional intent to render states liable. Furthermore, the definition of "person" in CERCLA closely resembles the definition of "person" in Title VII of the Civil Rights Act which this Court did find sufficient to show congressional intent to render states liable in *Fitzpatrick v. Bitzer*, 427 U.S. 445, 452 (1976) ("the 'threshold fact of congressional authorization' to sue the State as employer is clearly present").

Congress' intent to subject states to liability to private parties under section 107(a) is further evident in the inclusion of the federal and local governments in the definition of "person." Section 107(g) of CERCLA expressly waives the federal government's sovereign immunity. Thus, it is unimaginable that by enacting a "comprehensive" environmental law to clean up all the nation's waste sites which renders every private individual and legal entity potentially liable, including the federal government, Congress intended to omit states when it expressly included them.

At the time a divided panel of the court of appeals in *Union Gas I* found CERCLA's original language did not meet the clear statement rule, a Congressional conference committee was meeting to reconcile and compromise two substantially different versions of SARA that had been passed by the House and Senate in December 1985. See, H. R. 2817, 99th Cong., 1st Sess. (1985) and H. R. 2005 (1985). SARA was signed into law by the President on October 17, 1986. Just as Congress had legislatively changed the outcome in *Employees* and *Atascadero*,³ through SARA Congress amended CERCLA to show with more specificity its intention that states were potentially liable to private parties under section 107(a) of

3. Section 16(b) of the Fair Labor Standards Act, 29 U.S.C. §216(b), was amended in 1974 by Pub.L. 93-259, §6(d)(1), 88 Stat. 61. Section 504 of the Rehabilitation Act, 29 U.S.C. §794, was amended by Pub.L. No. 99-506, §1003, 100 Stat. 1807 (1986) (codified at 42 U.S.C. §200 d-7) (West Supp. 1987).

CERCLA. As stated by the identical, but now unanimous, panel that had decided *Union Gas I*: "In SARA, however, Congress enacted the unmistakably clear statutory language that demonstrates its intent to abrogate the states' eleventh amendment immunity." 832 F.2d at 1348 (Pet. App. 21-22)

In particular, SARA amended the definition of "owner or operator" to provide that states would not be liable if they acquired ownership or control of a contaminated site involuntarily through bankruptcy, abandonment, tax delinquency or other similar circumstance unless they caused or contributed to a release. But otherwise, ". . . such a State or local government shall be subject to the provisions of this Act in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title." This language not only affirms that Congress always intended states to be liable to all other persons for cleanup costs, but replicates the language Congress used in waiving federal liability for cleanup costs.⁴ The federal waiver was recodified by SARA from section 107(g) to section 120(a)(1) and provides:

Each department, agency, and instrumentality of the United States (including the executive, legislative, and

4. As the court of appeals in *Union Gas II* explained:

Originally, neither the Senate nor House version of SARA §101(b)(1) copied the waiver language of §9607(g) to abrogate state eleventh amendment immunity. However, the conference committee inserted language that replicated the federal waiver into the definition section, stating that its purpose was "to clarify that if the unit of government caused or contributed to the release or threatened release in question, then such unit is subject to the provisions of CERCLA, both procedurally and substantively, as any non-governmental entity, including liability under section 107 and contribution under section 113." H.R. Conf. Rep. No. 962, 99th Cong., 2d Sess. 185-86, reprinted in 1986 U.S. Code Cong. & Admin. News 2835, 3276, 3278-79. To the extent that the added language serves to "clarify" CERCLA, it amounts to a subsequent declaration of congressional intent that deserves great weight. *Red Lion Broadcasting v. F.C.C.*, 395 U.S. 367, 380-82, 89 S.Ct. 1794, 1801-02, 23 L.Ed. 2d 371 (1969). 832 F.2d at 1350 (Pet. App. 32-33)

judicial branches of government) shall be subject to, and comply with, this Act in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 107 of this Act.

Although Pennsylvania chides the court of appeals for misinterpreting SARA's amendment to "owner or operator," its alternative explanation is illogical. Pennsylvania contends that the amendment was to clarify only that states are not liable to private parties when states involuntarily acquire a site unless they cause or contribute to a release. There are two fallacies to this contention. First, an exclusion of liability would have meaning only so long as Congress understood section 107(a) to render states liable. Second, under this contention states would not be liable for cleanup at sites they acquired *voluntarily* where they caused releases of hazardous substances. Thus, a state could purchase a site voluntarily, pollute it, and not be liable for a private party's (perhaps a neighboring land owner's) cleanup costs, but would be liable if the site were acquired through abandonment. Such a construction is neither logical nor equitable.

To overcome the court of appeals' decision, the conference committee surgically grafted language to several sections to overcome the deficiencies cited in the court of appeals' analysis.⁵ The above-quoted language was added to the definition of "owner or operator." Local governments were referenced in the language because of a footnote in *Union Gas I* that suggested that local governments may be able to derive immunity through the Eleventh Amendment. 792 F.2d at 375, n. 3 (Pet. App. 80). Because the court of appeals had

5. Because *Union Gas I* was not a decision of this Court, the joint committee may not have felt the urgency of addressing it in a separate section as opposed to the changes it did make. Returning to Judge Higginbotham, he observed "we must never forget the complexity and the time constraints of the federal legislative process. Legislators do not have the time or the capacity to anticipate every possible argument that might be made subsequently by creative and clever counsel." *Union Gas I*, 792 F.2d at 386 (dissenting) (Pet. App. 135)

relied in *Union Gas I* on the federal government's explicit waiver of immunity to distinguish state immunity, the conference committee added a sentence to the federal waiver: "Nothing in this section shall be construed to affect the liability of any person or entity under sections 106 and 107." 42 U.S.C. §9620(a)(1)

Another indication of congressional intent to make states liable for cleanup costs to private parties under section 107(a) is that Congress preserved states' immunity to citizen suits in SARA. See 42 U.S.C. §9659(a)(1). Unlike section 107(a) which requires a plaintiff to have incurred cleanup costs prior to initiating suit, the citizen suit provision permits anyone to commence an action as a private attorney general to obtain an order correcting a violation of CERCLA. Congress' express preservation of states' Eleventh Amendment immunity from citizen suits thus stands in sharp contrast to section 107(a) liability where there is no such preservation of immunity.

C. Construing CERCLA to Permit Persons to Sue States Promotes the Purposes of the Act

The above construction of CERCLA is not only true to the text of the statute and congressional intent, but it promotes the goals of the Act. Even the expanded funding of the trust fund by SARA will fall far short of providing enough money to cleanup just those contamination sites listed on the NPL. See, Staff of House Comm. on Appropriations, 100th Cong., 2nd Sess., Report on Status of Environmental Protection Agency's Superfund Program (March 14, 1988); Mackerron, "Superfund: Uncle Sam Picks Up the Tab," Chemical Week, June 8, 1988, at 22-25. Since its first publication, the NPL has grown threefold and is still increasing. See, National Priorities List for Uncontrolled Hazardous Waste Sites—Update 7, 53 Fed. Reg. 23,987, 23,989 (1988) (to be codified at 40 C.F.R. Part 300, Appendix B) (proposed June 23, 1988). Absent voluntary cleanup by persons willing to expend substantial funds and other resources, most of the nation's contamination sites will

not be cleaned and we will pass, with barely a genuflection, our chemical and health problems to another generation.⁶

The principal incentive to a voluntary cleanup is the right to recover the necessary costs of cleanup from responsible parties under section 107(a). If states were eliminated from "persons" that could be sued to recover such costs, there would be a powerful disincentive to any cleanup efforts by private parties. Since CERCLA gives the federal courts exclusive jurisdiction over CERCLA causes of action, a private party cannot go into state court to recover from a state. Under Pennsylvania's view, whenever a state is arguably responsible for some portion of the cleanup costs under the statute, a private party is better off taking no action at all in the hope that the United States will cleanup the site and seek reimbursement from the state. In that way, a private party will not be left, as Union Gas was here, paying the state's share of cleanup costs. By the same token, states will have every incentive to resist participating in any voluntary cleanup in the hope that private parties will do the job and be unable to recoup any part of the cost from the state. Thus, Pennsylvania's view would frustrate the "comprehensive" plan of cleanup underlying CERCLA and leave private parties, such as Union Gas, to pay for contamination caused by states.

Inclusion of states among potentially responsible parties serves an additional salutary, if less obvious, purpose. The United States EPA has been criticized by its own inspector general for paying excessive amounts for emergency cleanups.⁷ If states have a direct monetary interest in wanting to

6. See, "Delays and Inefficiencies in the Superfund Program: Hearings Before the Subcomm. on Superfund and Environmental Oversight of the Senate Comm. on Environment and Public Works," 100th Cong., 1st Sess. (1987) (testimony and statement of James W. Moorman, Esq., former Assistant Attorney General for Land & Natural Resources, U.S. Dept. of Justice; remarks for Sen. Lautenberg) (Dec. 10, 1987); Assistant Attorney General for Land & Natural Resources, U.S. Department of Justice, December 10, 1987, and written testimony of Natural Resources Defense Council, December 10, 1987.

7. See EPA, Report of Audit, No. E5E26-05-0101-61508, Sept. 23, 1986.

reduce costs at sites for which they are responsible, they are in a stronger position to encourage a cost-effective cleanup. Cost effectiveness has many facets, from defining the scope of testing and evaluation, to the selection of a cleanup methodology, to the selection of a contractor. All these are areas that can be improved upon by direct state involvement to protect their pecuniary interest.

Pennsylvania and the amici states raise the spectre of potential burgeoning liability for waste sites. Unquestionably the cost of cleanup of all sites throughout the nation is expensive. The Department of Energy, for example, estimates its liability for cleanup of contamination at \$100 billion.⁸ The Department of Defense estimates its cost at \$14.8 billion.⁹ The cost of the cleanups to private parties has also been enormous. This Court has already answered the states' argument in *Employees* where it acknowledged that Congress acting under Article I could "place new or even enormous fiscal burdens on the States." *Supra.*, 411 U.S. at 284. States, however, have the same right as other "persons" liable under CERCLA to seek contribution from other responsible parties and have the court equitably allocate cleanup costs among all responsible parties. *See* 42 U.S.C. §9613(f)(1).

II. THE ELEVENTH AMENDMENT PRECLUDES FEDERAL COURTS FROM ASSERTING JURISDICTION ONLY IN DIVERSITY OF CITIZENSHIP CASES BETWEEN A DEFENDANT STATE AND A CITIZEN OF A DIFFERENT STATE

A. As Drafted in 1787, the Constitution Did Not Provide for State Sovereign Immunity in Federal Courts

When submitted to the states for ratification, the Con-

8. K. Schneider, "Energy Department Faulted on Dealing With Nuclear Waste", N.Y. Times, June 7, 1988 at A22.

9. See 2 Tox. Tort Rep. (BNA) 756-57 (1987) citing testimony of the Department of Defense before Congress; DOD, "Defense Environmental Restoration Program: Annual Report to Congress for Fiscal Year 1987," March 1, 1988 at 14.

stitution lacked any provision granting states sovereign immunity in the federal courts. Nor was there any reason to provide such immunity. The Constitution was a compact among the people of the United States to create a federal form of government.¹⁰ *See*, Amar, "Of Sovereignty and Federalism," 96 Yale L.J. 1425, 1439 (1987). The Constitution was ratified, not by state legislatures, but by constitutional conventions whose delegates were selected by the people.

State sovereignty that existed prior to 1787 was revoked and bestowed on a new federal sovereign to the extent necessary for the federal sovereign to exercise its powers. *See* Fletcher, "A Historical Interpretation of the Eleventh Amendment," 35 Stanford L.Rev. 1033, 1069 (1983). As James Madison stated in *The Federalist*, "as far as the sovereignty of the States cannot be reconciled to the happiness of the people, the voice of every good citizen must be, Let the former be sacrificed to the latter." *The Federalist*, No. 45 at 289 (C. Rossiter ed. 1961). The states, thus, were stripped of sovereign immunity—in the then-prevalent international sense—that they enjoyed prior to ratification of the Constitution. Though not expressed in the Constitution until adoption of the Tenth Amendment, states remained sovereign within their borders as to matters not bestowed on the federal government. *See*, *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 549-50 (1985).

The limitation on states' sovereign immunity was essential to the effectiveness of the federal sovereign. The three branches of the federal government were roughly co-extensive in order to provide the requisite checks and balances. To resolve disputes effectively, the judicial branch had to possess jurisdiction over the entire federal domain to be "capable of deciding every judicial question which grows out of the constitution and laws." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 384 (1821). Article III of the Constitution provided for two basic types of jurisdiction: subject matter jurisdiction and

10. By contrast, the failed Articles of Confederation were a compact of the states and operated only on the states, not citizens.

party jurisdiction. Subject matter jurisdiction extended to "... all cases, in law and equity, arising under the Constitution, the laws of the United States, and Treaties made, or which shall be made under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction . . ." Party jurisdiction was more specific and, as relevant hereto, extended "... to controversies between two or more states; between a state and citizens of another state; ... and between a state, or the citizens thereof, and foreign states, citizens or subjects." Nothing in Article III or other parts of the Constitution, as originally ratified, expressed or implied that states were immune from suit in the federal sphere.

The Judiciary Act of 1789 codified Article III's grant of jurisdiction in state-citizen diversity actions. Ch. 20, §13, 1 Stat. 73, 80. As one scholar has pointed out, the Judiciary Act was passed only a month after the House of Representatives killed a proposed amendment to eliminate the state-citizen diversity clause from Article III of the Constitution. Fletcher, *supra.*, 35 Stan. L. Rev. at 1052-53.

The States' amici brief incorrectly contends that state immunity from suit brought by citizens in federal court was embodied in the Constitution as ratified. Ignoring the precise words of Article III which give the judiciary jurisdiction over such suits in diversity cases as well as the more general grant of jurisdiction in federal subject matter cases, the states' rely on isolated remarks of Madison, Marshall and Hamilton made in *The Federalist* and the Virginia debates.¹¹ However, scholars who have recently researched the historical records of the Constitutional Convention and the ratification debates suggest that the cited remarks of Madison, Marshall and Hamilton addressed federal diversity jurisdiction, not federal subject matter jurisdiction.¹² Four members of this Court have

11. A plurality of this Court recently concluded that "at most" "the intentions of the Framers and Ratifiers were ambiguous." Welch, 107 S.Ct. at 2951.

12. See, e.g., Jackson, "The Supreme Court, the 11th Amendment and

observed that important delegates at ratification conventions such as Mason, Henry, Pendleton, Randolph, and Wilson "did not believe that state sovereign immunity provided protection against suits initiated by citizens of other states." Welch, 107 S.Ct. at 2962-63 (dissent); *Atascadero*, 473 U.S. at 264-80 (dissent). Two of these individuals, Randolph and Wilson, had served as members of the Committee of Detail at the Constitutional Convention.

Thus, as drafted, the Constitution lacked any substantive grant of state sovereign immunity and specifically opened the federal courts to certain types of suits against states.

B. The Eleventh Amendment Precludes Federal Court Jurisdiction Only In Actions Brought By Individuals Against States Based On Diversity of Citizenship

The Eleventh Amendment is not a broad grant of state sovereign immunity but a narrow jurisdiction preclusion provision. The Amendment makes no mention of substantive sovereign immunity. It provides:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The congruence between the language of the Amendment and Article III, section 2 of the Constitution is apparent ("The judicial power shall extend . . . to controversies . . . between a state . . . and foreign . . . citizens or subjects"), and strongly suggests that only cases brought against states by citizens of other states or aliens on the basis of diversity of citizenship were barred from federal jurisdiction.

We know, of course, that the Eleventh Amendment was

State Sovereign Immunity," 98 Yale L.J. 1 (forthcoming, Oct. 1988); Amar, *supra.*, 96 Yale L.J. at 1475; Gibbons, "The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation," 83 Colum. L. Rev. 1889, 1913 (1983); Fletcher, *supra.*, 35 Stan. L. Rev. at 1063.

added to the Constitution to reverse this Court's decision in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). *Chisholm* involved an action in assumpsit to recover for goods sold by a South Carolina merchant to Georgia during the Revolutionary War. In a 4-1 decision, this Court held that the state-citizen diversity clause of Article III of the Constitution conferred original jurisdiction on this Court. James Wilson and Edmund Randolph participated in the case, respectively, as a justice of this Court and the Attorney General of the United States representing the plaintiff.

The decision in *Chisholm* is free of any doubt that the majority and lone dissenter understood that jurisdiction was based on the state-citizen diversity clauses of Article III of the Constitution and section 13 of the Judiciary Act. See 2 U.S. (Dall.) at 466 (J. Wilson) and 431 (J. Iredell, dissenting). Justice Iredell, a proponent of state sovereign immunity, acknowledged that the United States was sovereign as to all powers surrendered by the states, with state sovereignty limited to the powers reserved to the states. 2 U.S. (Dall.) at 435 (dissent). Implicit in his opinion is that states did not surrender their sovereignty to be sued in federal court for breach of contract. Thus, Justice Iredell did not contend that states were immune from suit in federal court in all circumstances. See, also, *Atascadero*, 473 U.S. at 283 (dissent).

After ratification of the Eleventh Amendment,¹³ but before *Hans v. Louisiana*, 134 U.S. 1 (1890), the Supreme Court interpreted the Amendment literally and narrowly as precluding only federal court jurisdiction in state-citizen diversity cases. The states did not even raise the Eleventh Amendment as a jurisdictional bar in three cases brought between 1810 and 1819 where the appellate jurisdiction of this Court was invoked by individuals suing states. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *New Jersey v. Wilson*, 11 U.S. (7 Cranch.) 164 (1812); *Smith v. Maryland*, 10 U.S.

13. Ironically, Pennsylvania's legislature refused to ratify the Eleventh Amendment. See *Mayle v. Pennsylvania*, 479 Pa. 384, 402, 388 A.2d 709, 718 (1978).

(6 Cranch.) 286 (1810). Eventually when the Eleventh Amendment was raised as a defense, this Court found the Eleventh Amendment did not preclude federal appellate jurisdiction in an action by a citizen against his own state, *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821), or original jurisdiction in an action against a state official based on federal law to recover money deposited in a state treasury. *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824). In *Cohens*, Chief Justice Marshall addressed the conflict between Article III jurisdiction and state sovereign immunity as follows:

... are we at liberty to insert in this [Article III] general grant, an exception of those cases in which a State may be a party? Will the spirit of the constitution justify this attempt to control its words? We think it will not. We think a case arising under the constitution or laws of the United States, is cognizable in the Courts of the Union, whoever may be the parties to that case. *Id.*, at 382-383.

C. *Hans v. Louisiana* Should Be Overturned

Ninety-five years after ratification of the Eleventh Amendment, this Court extended the Amendment's coverage in a way never intended by Congress or the state legislatures that ratified it. *Hans v. Louisiana* was the culmination of a line of lawsuits that had reached the Supreme Court seeking payment on bonds which certain states, predominantly in the post-Civil War South, had repudiated. See *Gibbons, supra.*, 83 Colum. L.Rev. at 1968-2002. *Hans*, a citizen of Louisiana, sought to enforce payment of interest on a bond issued by Louisiana in 1874 where payment had been guaranteed by an amendment to Louisiana's constitution. In 1879, Louisiana amended its constitution to repudiate the bond. *Hans* claimed that the 1879 amendment to Louisiana's constitution impaired his contract in violation of Article 1, section 10 of the United States Constitution. Federal court jurisdiction was premised on the "arising under" clause of Article III and the 1875 Act of Congress which codified general original federal question jurisdiction. 18 Stat. 470.

This Court held that the Eleventh Amendment precludes federal court jurisdiction over suits by individuals against states irrespective of whether jurisdiction is founded on a federal question or state-citizen diversity. Though legitimate doubts have been raised as to whether the decision in *Hans* was grounded in the Constitution or merely upon the absence of a federal cause of action, *Atascadero*, 473 U.S. at 299-300 (dissent), this Court has recognized the former to be the case. *Monaco v. Mississippi*, 292 U.S. 313, 322-23 (1934). As a constitutional decision, the reasoning in *Hans* is insubstantial and the precedent relied upon flawed. Recognizing the textual limitation of the Eleventh Amendment, Justice Bradley relied in the opinion on the 1798 decision of this Court in *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378, and an ante-constitutional view of sovereign immunity as expressed in Justice Iredell's dissent in *Chisholm* and Alexander Hamilton's view in *The Federalist*, No. 81.

Justice Bradley contended that *Hollingsworth* showed the understanding of the Supreme Court in 1798, just after ratification of the Eleventh Amendment, that the Amendment applied to federal question as well as state-citizen diversity suits. The *per curiam* opinion in *Hollingsworth* is a single line stating "there could not be exercised any jurisdiction, in any case, past or future, in which a state was sued by the citizens of another state, or by citizens or subjects of any foreign state." *Id.* at 382. *Hollingsworth* was an action in equity to quiet title to disputed lands, so that no federal question was involved. I J. Goebel, *History of the Supreme Court of the United States: Antecedents and Beginnings to 1801*, 725 (1971). Indeed, the sole issue in *Hollingsworth* was whether the Eleventh Amendment applied prospectively or retroactively. It would seem a leap of logic, therefore, for Justice Bradley to contend in *Hans* that the words "in any case" referred to both federal question and state-citizen diversity cases when quite apparently they refer to "past or future" cases. Furthermore, if Justice Bradley were correct in his interpretation, it is nothing less than astounding that Chief Justice Marshall and counsel for the parties in *Cohens v. Virginia* failed to cite or allude to

Hollingsworth which was then one of the few Supreme Court cases mentioning the Eleventh Amendment.

Justice Bradley's reliance on an ante-constitutional view of state sovereign immunity has been almost universally criticized in recent years. The dissenting opinions in *Employees, Atascadero, Pennhurst* and *Welch* digest the recent scholarly research and point out that Justice Bradley reached the wrong conclusions from his quotations from Justice Iredell and Alexander Hamilton. It bears emphasizing that the central premise in Justice Bradley's argument was that *Chisholm* was wrongly decided. Yet an adverse popular reaction to *Chisholm* does not require the conclusion that the case was wrongly decided. Rather, as contended above, *Chisholm* was a correct constitutional decision that was overturned by the political act of amending the Constitution.

D. Overturning *Hans v. Louisiana* Will Have a Salutary Effect on Eleventh Amendment Jurisprudence

The holding in *Hans* has spawned a raft of legal fictions that would otherwise be unnecessary. For example, individuals may sue state officials to obtain injunctive relief so long as the state is not named as a defendant. *Ex Parte Young*, 209 U.S. 123 (1908). Another example, individuals may sue states for monetary relief where Congress has abrogated states' Eleventh Amendment immunity or the states have consented to suit. *Fitzpatrick v. Bitzer*, *supra*; *Welch v. State Dept. of Highways*, *supra*. While born of pragmatism, these fictions support an erroneous principle that should be cast aside.

Federal question jurisdiction has grown exponentially in the past 100 years with Congress regulating an ever growing list of fields. With that growth has come an increasing number of affirmative rights individuals may exercise. Several of these fields necessarily involve states. In many instances, individual rights cannot be vindicated unless individuals are able to sue states for wrongdoing, not just to obtain injunctive relief, but for monetary awards. That is especially

true in connection with CERCLA where Congress has legislated a solution to a festering environmental problem that is dependent on all individuals and legal entities, corporate and politic, voluntarily contributing to cleanups which the federal government alone cannot afford. To achieve a uniformity of enforcement, Congress gave the federal district courts exclusive original jurisdiction over CERCLA cases. 42 U.S. §9613(b). CERCLA is a program that is ill-suited to frustration by individual states jealous of their turf, yet that will be the result if individuals cannot sue states in federal court.

If the true underpinning of *Hans* is an ante-Constitutional concept of state sovereign immunity, that concept is itself outmoded. States have themselves largely dismantled the trappings of state sovereign immunity. The courts of over 30 states have partially or completely abolished sovereign immunity. See, K. C. Davis, *Administrative Law Treatise*, §25.00 (1980 Supp.). Pennsylvania's Supreme Court abolished the doctrine in that state in 1978. *Mayle v. Pennsylvania, supra*. Two years later, Pennsylvania's legislature enacted sovereign immunity as substantive law but created numerous exceptions. 42 Pa.C.S. §8521 *et seq.*

If, as Union Gas contends, *Hans* was wrongly decided, then the doctrine of *stare decisis* alone cannot support its continuation. *But see, Welsh*, 107 S.Ct. at 2956. While *stare decisis* is an important element in the fabric of the law, it is not of constitutional stature. To perpetuate a misinterpretation of the Constitution on the ground that wooden adherence to *stare decisis* demands it—is itself unconstitutional since it undermines the Supremacy Clause.

Furthermore, overturning *Hans* will not lead to chaos. There will be no change in the result in this case since CERCLA satisfies the clear statement rule. A current scholarly article analyzed the 17 Eleventh Amendment cases cited in the plurality decision in *Welch* and concluded there would be little change in the outcome of those cases so long as a less stringent version of the clear statement rule is retained. See, *Jackson, supra.*, note 12. Under that analysis, there would be no change in this Court's decisions involving federal question

claims brought under federal statutes. Jurisdiction of federal claims involving state taxation can be resolved under traditional doctrines of comity and abstention as can pendent state law claims. The result would be different, however, in admiralty and this Court's original jurisdiction cases, but such cases are relatively few and the need for uniformity of law in these areas is great.

Thus, *Hans* was a wrong turn for this Court and has spawned a progeny of cases that befuddle an otherwise straightforward interpretation of the Eleventh Amendment. As is especially evident in this case, its doctrine "intrudes on the ideal of liberty under law by protecting the States from the consequences of their illegal conduct." *Atascadero*, 473 U.S. at 302 (dissent). Now is the time to sweep away this pernicious precedent.

III. ARTICLE I OF THE CONSTITUTION EMPOWERS CONGRESS TO ABROGATE STATE IMMUNITY TO PRIVATE LAWSUITS

The anomalies in Eleventh Amendment jurisprudence caused by this Court's wrong turn in *Hans* now force this Court to consider whether Congress has authority to abrogate the Eleventh Amendment's jurisdictional preclusion in Article I enactments. A decision on this issue is unnecessary if *Hans* is overturned.

A. Prior Decisions of This Court Have Acknowledged the Constitutionality of Article I Abrogation

The Eleventh Amendment does not embody a substantive rule of state sovereign immunity. Indeed, the Amendment is simply a jurisdiction preclusion clause. To the extent that states enjoy sovereign immunity within their borders on matters of state law, that immunity derives from the common law or state constitutional or legislative enactment. It follows, then, that the Eleventh Amendment imposes no limitation on Congress' plenary power under Article I to enact laws declar-

ing that persons may recover damages from states for violation of federal law.

This Court has recognized the above rule in its Eleventh Amendment jurisprudence.¹⁴ In *Parden v. Terminal Railway of the Alabama State Docks Department*, 377 U.S. 184 (1964), where this Court held that Congress had abrogated state immunity in a commerce clause enactment, this Court declared:

While a State's immunity from suit by a citizen without its consent has been said to be rooted in "the inherent nature of sovereignty," *Great Northern Life Ins. Co. v. Read, supra*, 322 U.S. 47, 51, 88 L.Ed. 1121, 1125, 64 S.Ct. 873, the States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce.

"This power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitation other than are prescribed in the constitution. . . . If, as has always been understood, the sovereignty of congress, though limited to specified objects is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States." *Gibbons v. Ogden*, 9 Wheat 1, 196-197, 6 L.Ed. 23, 70.

* * *

The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal

14. So too has every court of appeal addressing the issue: *Union Gas II*, 832 F.2d at 1356 (Pet. App. 64-65a); *In re McVey Trucking*, 812 F.2d 311, 328 (7th Cir. 1987) cert. denied 108 S.Ct. 227 (1987); *County of Monroe v. Florida*, 678 F.2d 1124, 1128-35 (2d Cir. 1982) cert. denied, 459 U.S. 1104 (1983); *Peel v. Florida Department of Transportation*, 600 F.2d 1070, 1074-82 (5th Cir. 1979); *Mills Music, Inc. v. Arizona*, 591 F.2d 1278, 1285 (9th Cir. 1979).

government in the Constitution . . . [T]here is no such limitation upon the plenary power to regulate commerce [as there is upon the federal power to tax state instrumentalities]. The state can no more deny the power if its exercise has been authorized by Congress than can an individual.

By empowering Congress to regulate commerce, then, the States necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation. *Id.* at 191-92.

This Court followed the above rule in *Employers*, a case involving an amendment to the Fair Labor Standards Act enacted pursuant to Article I's commerce clause. Although this Court held that Congress had not satisfied the clear statement rule, the Court nonetheless reaffirmed that Congress was authorized to abrogate state immunity from suit in Article I enactments stating:

Where employees in state institutions not conducted for profit have such a relation to interstate commerce that national policy, of which Congress is the keeper, indicates that their status should be raised, Congress can act. And when Congress does act, it may place new or even enormous fiscal burdens on the States. *Id.* 411 U.S. at 284.

More recently, this Court has assumed the continued validity of this rule, *Welch* at 2946 (plurality opinion), and declined to review it. See, e.g., *Edgar v. McVey Trucking*, 108 S.Ct. 227 (1987).

Pennsylvania and amici contend that decisions by this Court in Fourteenth and Fifteenth Amendment cases undermine the rule's vitality. In particular, they contend this Court's statements in *Fitzpatrick* support their argument:

But we think the Eleventh Amendment, and the principle of state sovereignty which it embodies, see *Hans v. Louisiana*, 134 U.S. 1, 33 L.Ed. 842, 10 S.Ct. 504 (1890) are necessarily limited by the enforcement provisions of §5 of the Fourteenth Amendment.

* * *

We think that Congress may, in determining what is "appropriate legislation" for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts. 427 U.S. 445 at 457.

The "other contexts" adverted to in the above quote are not Article I enactments as suggested by Pennsylvania. Petitioner's Brief at 40. The narrow issue in *Fitzpatrick* was whether the Eleventh Amendment restricted Congress in rendering states liable to individuals in Fourteenth Amendment enactments. The Fourteenth Amendment, after all, bestowed on Congress the power to legislate in areas such as the states' justice systems that traditionally had been wholly in the states' sphere. But for the Amendment, Congress had no authority to invade the states' sphere and render them liable to private parties. The Court's vague reference to "other contexts," then, suggests that the Court will carefully examine intrusions into the states' central government activities in Fourteenth Amendment enactments which render the states' liable to private parties.¹⁵

B. Principles of Federalism Require that Congress' Plenary Power Under Article I Not Be Diminished By A Judicial Inability to Enforce Its Enactments

Congress' power under Article I to subject states to suit in federal court manifests itself in the interplay among Article I, the Supremacy Clause and the Eleventh Amendment. If, as the Constitution declares, the Constitution and laws made by Congress are to be the supreme law of the land, Congress must have authority to regulate the conduct of the states under Article I, and the judiciary must have authority to

15. See Field, "The Eleventh Amendment and Other Sovereign Immunity Doctrines," 126 U. Pa. L. Rev. 1203, 1233 (1978).

enforce Congress' laws.¹⁶ Sovereignty cannot inhere in authority bereft of the means of enforcement. Only if construed as a narrow jurisdiction preclusion clause is the Eleventh Amendment consistent with this concept.

The Constitution cannot be read on a timeline with the Eleventh Amendment as a watershed controlling under which provision of the Constitution Congress can regulate states by making them subject to private suits for money damages. To do so would impinge on Congress' ability to establish uniform federal policy and regulate the states regarding its primary governmental functions specified in Article I yet permit Congress to regulate the states in areas traditionally peripheral to Congress' role. Such an interpretation would be illogical. As this Court stated in *Prout v. Starr*, 188 U.S. 537, 543 (1903):

The Constitution of the United States, with the several amendments thereof, must be regarded as one instrument, all of whose provisions are to be deemed of equal validity. It would, indeed, be most unfortunate if the immunity of the individual states from suits by citizens of other states, provided for in the Eleventh, were to be interpreted as nullifying those other provisions which confer power on Congress to regulate commerce among the several states, which forbid the states from entering into any treaty, alliance or confederation, from passing any bill of attainder, ex post facto law or law impairing the obligation of contracts . . . —all of which provisions existed before the adoption of the Eleventh Amendment, which still exist, and which would be nullified and made of no effect, if the judicial power of the United States could not be invoked to protect citizens affected by the passage of state laws disregarding these constitutional limitations.

16. See Tribe, "Intergovernmental Immunities in Litigation, Taxation and Regulation," 89 Harv. L. Rev. 682, 694 (1976).

The non-unitary concept of the Constitution espoused by Pennsylvania and amici has its basis in a misreading of *Fitzpatrick*. While *Fitzpatrick* drew upon the fact that the Fourteenth Amendment post-dated the Eleventh, it did so only to make the point that the states willingly surrendered to Congress broad powers traditionally within the states' sphere notwithstanding the existence of the Eleventh Amendment. *Fitzpatrick* did not eviscerate the Necessary and Proper Clause of Article I, §8, by limiting judicial enforcement of otherwise proper congressional enactments. The Eleventh Amendment, by its own terms, cannot limit congressional power since it is directed solely at judicial power.

Again, this case illustrates the harm that would be wrought by a limitation on Congress' power to render states liable to private parties for cleanup costs. Because the federal courts have exclusive jurisdiction over CERCLA causes of action, private parties like Union Gas are limited to suing in federal court. If a state cannot be sued by private parties, private parties will resist or delay voluntary cleanup of a site in hopes that the EPA will undertake the cleanup and sue the state. Likewise, a state will have an incentive to avoid funding a cleanup in hopes that private parties will do so. The resulting standoff frustrates the congressional scheme and unduly strains the limited resources of the Superfund trust fund.

The states' protection from congressional abuse of its Article I power is found in the structure of the Constitution itself. *South Carolina v. Baker*, 108 S. Ct. 1355 (1988) As this Court observed in *Garcia*, Congress consists of senators and representatives elected in each of the fifty states, and they are responsive to states' concerns. *Supra*, 469 U.S. at 550. "It is no novelty to observe that the composition of the Federal Government was designed in large part to protect the States from overreacting by Congress." *Id.* at 551. States' direct linkage to federal lawmakers insures that the states' interests will be considered. Furthermore, federal law-making does not occur in a vacuum—states frequently take a direct role in lobbying congressmen and presenting testimony supportive of their position, as they did when CERCLA and SARA were enacted.

The framers of the Constitution properly envisioned a

judiciary whose jurisdiction was coextensive with Congress' Article I powers, and the Eleventh Amendment should not be construed to distort that vision.

IV. STATE CONSENT IS NOT A PREREQUISITE TO CONGRESSIONAL ABROGATION

State consent to suit is superfluous where, as in CERCLA, Congress abrogated state immunity to suit. Unlike *Parden*, it is unnecessary to imply Pennsylvania's consent to suit for participating in a federally regulated area since Congress unmistakably expressed its intention to subject states to liability under section 107(a) of CERCLA.

The clear statement rule is a standard of judicial interpretation—it was not intended as a general notice provision. CERCLA, as originally enacted, put states as well as other individuals and entities on notice that they were "persons" who could sue and be sued under section 107(a). Thus, Pennsylvania received as much notice as Union Gas and all other "persons" of their rights under CERCLA.¹⁷ The mere fact that CERCLA imposes liability based on a person's status creates no unfairness to states that is not visited on all other persons. If, as numerous lower courts have held, CERCLA's imposition of retroactive liability is constitutional under the Fifth Amendment Due Process Clause,¹⁸ notice is irrelevant and no Eleventh Amendment issue is even implicated.

17. The notice issue raised by Pennsylvania is also irrelevant since both before and after passage of CERCLA, the seepage of coal tar from the Brodhead Creek site continued while Pennsylvania was an owner and operator of the site.

18. See *U.S. v. Northeastern Pharmaceutical & Chemical Co., Inc.*, 810 F.2d 726, 732-34 (8th Cir. 1986) and cases cited therein.

CONCLUSION

For all the foregoing reasons, the decision of the court of appeals in *Union Gas II* should be affirmed and the case remanded to the district court for further proceedings.

Respectfully submitted,

July 11, 1988

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COMMONWEALTH OF PENNSYLVANIA,

Petitioner

v.

UNION GAS COMPANY,

Respondent

On Writ of Certiorari
To The United States Court of Appeals
For the Third Circuit

REPLY BRIEF FOR PETITIONER

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ARGUMENT

I. CONGRESS, IN ENACTING AND AMENDING CERCLA, DID NOT INTEND TO SUBJECT UNCONSENTING STATES TO LIABILITY TO PRIVATE PARTIES.

1. As discussed in Pennsylvania's opening brief, nothing in CERCLA,¹ as originally enacted, approaches the "unmistakably clear" statement of Congressional intention which the Court has held is necessary to affect the States' Eleventh Amendment immunity. Br. for Pet., p. 15-18; see Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985). To the contrary, even the Court of Appeals conceded that CERCLA was "almost identical"

to the statute² involved in Employees of Dept. of Public Health and Welfare v. Missouri Department of Health and Welfare, 411 U.S. 279 (1973), where the Court held that Congress had expressed no such intention. Pet. App. 100a. CERCLA, like the statute involved in Employees, was intended to make local governments and other actors liable to any injured party, but to make the States liable only to the United States. See 42 U.S.C. § 9607(a)(1)(A); Employees, supra, at 285-86.

CERCLA had established a standard of strict liability, that is, liability without regard to fault. 42 U.S.C. § 9607(b); H.R. Rep. No. 99-253(I),

¹Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9601, et seq.

²The Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq.

99th Cong., 2d Sess., 74, reprinted in 1986 U.S. Code Cong. & Adm. News 2835, 2856. In the legislation known as SARA³, however, Congress modified this standard to limit the liability of state and local governments, by providing that in certain cases--specifically, where a state or local government had acquired a polluting facility involuntarily--the government unit would be liable only if it was at fault with regard to the pollution; SARA, § 101(b), codified at 42 U.S.C.A. § 9601(20)(D) (West Supp. 1988); see Br. for Pet., p. 18-19. Before SARA, a State was strictly liable, but only to the United States. After SARA, a State is still liable only

to the United States, but now may assert, in the appropriate circumstances, the defense that it is not at fault. SARA's change in the standard of liability thus did nothing to decrease CERCLA's resemblance to the statute construed in Employees, and certainly nothing in SARA comes close to meeting Atascadero's "clear statement" rule.

In arguing otherwise, Union Gas essentially repeats the arguments made by the Court of Appeals. Br. for Resp., p. 9-14. Pennsylvania has already responded to these convoluted and unconvincing arguments in its opening brief, Br. for Pet., p. 15-27, and will not repeat that material here. Worth noting, however, are some of the things Union Gas does not say.

First, Union Gas makes no real effort to distinguish the statute here

³Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub.L. No. 99-499, 100 Stat. 1613 (1986).

from the statute at issue in Employees, or to explain why similar statutes should receive the dissimilar construction it espouses. Second, Union Gas makes no attempt to support its assertion that Congress was dissatisfied with the Court of Appeals' first decision in this case, and "surgically" crafted SARA in response to it. Br. for Resp. p. 13-14. There is in fact no evidence that Congress was thinking about Union Gas I when it drafted SARA;⁴ and there is for that matter no evidence that

Congress was thinking about the Eleventh Amendment at all. All of the relevant legislative history shows that Congress wanted to limit governmental liability, not expand it. See Br. for Pet., p. 20. Finally, Union Gas makes no effort to explain the contrast between the language in SARA and the language in the Rehabilitation Act Amendments of 1986, where Congress certainly was thinking about the Eleventh Amendment. See Br. for Pet., p. 26-27.

2. Union Gas, however, relies heavily on what it sees as CERCLA's purpose, as opposed to CERCLA's language. Br. for Resp., p. 6-9, 14-16. Union Gas argues that if private parties cannot sue the States for their cleanup costs, they will be reluctant to undertake voluntary cleanup efforts, while the States for their part will likewise

⁴Union Gas tries to explain away this dearth of evidence by positing that Congress lacks "the time or the capacity" to specifically discuss the decision of a mere Court of Appeals. Br. for Resp., p. 13, n.5. This, of course, is not the case, as SARA's legislative history shows. See H.R. Rep. No. 99-253(I), 99th Cong., 2d Sess., 74, reprinted in 1986 U.S. Code Cong. & Adm. News 2835, 2856 (discussing favorably the decision in United States v. Chem-Byne Corp., 572 F.Supp. 802 (S.D. Ohio 1983)).

resist voluntary cleanups, in the hope that some private party will be forced to bear the costs. All of this, Union Gas says, is contrary to Congress' purpose in enacting a "comprehensive" statute. Br. for Resp., p. 15.

The short answer to this, of course, is that the best guide to Congress' purpose is Congress' language. Congress was well aware of the decision in Employees when it enacted the "almost identical" scheme in CERCLA, and was well aware of the decision in Atascadero when it enacted SARA. Congress knows well enough how to address the Eleventh Amendment when it wants to, but in the language of CERCLA and SARA Congress showed no disposition to do so.

Union Gas' argument also fails to recognize that under CERCLA States pay a substantial share of cleanup costs even when they are not involved in the underlying pollution. CERCLA requires that States pay 10% of the costs incurred by the federal government for remedial actions at privately owned facilities, 42 U.S.C. § 9604(a) (3)(C)(i); at least 50% of the federal response costs for releases from facilities owned by States or their political subdivisions, 42 U.S.C. § 9604(c)(3)(C)(ii);⁵ plus the entire cost of the future maintenance of removal and remedial actions for all

⁵In other words, as to this 50% the States do not have available even the limited defenses allowed by CERCLA. See, e.g., 42 U.S.C. § 9607(b)(listing allowable defenses).

facilities; 42 U.S.C. § 9604(a)(3)(A).⁶ It is thus inaccurate to suggest that the absence of liability to private parties gives States a "free ride" that discourages both States and private parties from voluntary cleanups.

Certainly, this theory bears no relation to the facts of this case. Union Gas claims to have proceeded all along on the assumption that it could recover its costs from Pennsylvania's treasury, yet this expectation did not spur Union Gas to a voluntary cleanup. It was the United States, not Union Gas, which cleaned up Brodhead Creek, and it is Pennsylvania, not Union Gas, which is continuing the remedial activities there. Br. for Resp., p. 3-4.

⁶In theory, of course, some of these costs are recoverable from responsible private parties. In practice, however, these parties will often be dead, dissolved or insolvent.

The real incentive for voluntary action under CERCLA is not the prospect of recovery from a third party --which, as a practical matter, will often be unavailable anyway--but the threat of having to pay for costly remedial actions by the federal government. Union Gas, which was not moved to action even by this threat, is in no position to question the wisdom of Congress in not opening the State treasuries to private lawsuits.

II. HANS V. LOUISIANA WAS CORRECTLY DECIDED AND SHOULD NOT BE OVERRULED.

In Hans v. Louisiana, 134 U.S. 1 (1890), the Court held that an unconsenting State cannot be sued in the federal courts by one of its own citizens, even if the case arises under the Constitution and laws of the United States. The Court based its holding, not so much on the Eleventh Amendment as such, but on the Constitution as it stood even before the Eleventh Amendment was adopted: "The truth is, that the cognizance of suits and actions [against unconsenting States] was not contemplated by the Constitution when establishing the judicial power of the United States." Id., at 15. As the Court has many times explained,

That a State may not be sued without its consent is a fundamental rule of jurisprudence having so important a bearing upon the construction of the Constitution of the United States that it has become established by repeated decisions of this court that the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against the State without consent given: not one brought by citizens of another State, or by citizens or subjects of a foreign State, because of the Eleventh Amendment; and not even one brought by its own citizens, because of the fundamental rule of which the Amendment is but an exemplification.

Ex parte New York, No. 1, 256 U.S. 490, 497 (1921)(citations omitted), quoted in Atascadero State Hospital v. Scanlon, 473 U.S. at 239, n.2. Hans, and the long line of cases that follow it, establish not just a principle of State sovereign immunity but a structural principle of

federalism that recognizes the vital role of the States in our federal system. "A state's constitutional interest in immunity encompasses not merely whether it may be sued, but where it may be sued." Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 99 (1984)(footnote omitted, emphases in original).

In the century since it was decided, "the fundamental principle enunciated in Hans has been among the most stable in our constitutional jurisprudence." Welch v. Dept. of Highways and Public Transportation, No. 85-1716 (June 25, 1987), slip op. at 17 (plurality opinion). See Atascadero State Hospital v. Scanlon, supra, at 243-44, n.3 (collecting cases). Nevertheless, Union Gas and its amici ask

the Court, for the fifth time in three years, to re-examine Hans and its progeny. Br. for Resp., p. 16-25. "Once again, [they] have placed in issue the fundamental nature of our federal system." Welch, supra, slip op. at 10 (plurality opinion). Union Gas and its amici base their argument on 1) the asserted incorrectness of Hans on the basis of the historical record and 2) the asserted "pernicious" effects that Hans has produced, Br. for Resp., p. 25. They are wrong on both counts.

A. Hans Was Correctly Decided.

The historical and legal underpinnings of the decision in Hans have been exhaustively recounted on many occasions, and there is no need to repeat that material here. See, e.g.,

Welch, supra, slip op. at 11-16 (plurality opinion); Edelman v. Jordan, 415 U.S. 651, 600-662; Hans, supra, at 12-14. Pennsylvania here reviews only the main headings of that support:

1. The text of Article III of the Constitution is at least as supportive of Hans as not. Article III, Section 2 extends the federal judicial power to all cases arising under the federal Constitution, laws and treaties, and (before the Eleventh Amendment) to controversies "between a State and citizens of another State." The question is whether these grants were subject to the implied immunity of States from suits by individuals, so as to reach only those cases where a State was a plaintiff or waived its immunity.

The broad language of the clauses in question contains no such limitation; nevertheless, this is exactly

the construction given to the equally broad clauses of the same section that extend the judicial power to "controversies to which the United States shall be a party" and to "all cases affecting ambassadors, other public ministers and consuls." Despite this broad language, the Court has recognized the United States' immunity from suit at least since United States v. McLemore, 4 How. 286 (1846); and no one, to Pennsylvania's knowledge, has ever suggested seriously that Article III abrogated diplomatic immunity.⁷

⁷This also answers the argument, made most elaborately in the amicus brief of the Chemical Manufacturers Association, that States are not immune from suits that present federal questions. Br. of Chem. Manu. Ass'n., p. 10-16. Neither the United States nor diplomats lose their immunity in such cases, and it is hard to see why the States should.

Nothing in Article III precludes a similar construction for cases involving the States, and indeed it is difficult to see why these similar clauses should not receive similar constructions.

2. During the debates on the ratification of the Constitution, Madison, Marshall and Hamilton all espoused the construction just discussed. Madison:

[Federal] jurisdiction in controversies between a state and citizens of another state is much objected to, and perhaps without reason. It is not in the power of individuals to call any state into court. The only operation it can have, is that, if a state should wish to bring a suit against a citizen, it must be brought before the federal court.

3 J. Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 533 (2d ed. 1861). Marshall:

I hope that no gentleman will think that a state will be called at the bar of the federal court.... It is not rational to suppose that the sovereign power should be dragged before a court. The intent is, to enable states to recover claims of individuals residing in other states.

Id., at 555. Hamilton:

It has been suggested that an assignment of the public securities of one State to the citizens of another, would enable them to prosecute that State in the federal courts for the amount of those securities; a suggestion which the following considerations prove to be without foundation. It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.

The Federalist No. 81, p. 511 (B. Wright ed. 1961)(emphasis in original). These assurances, given in response to fears that the new federal courts would saddle the debt-heavy States with treasury-breaking liabilities, may well have been essential to the Constitution's ratification. Welch, supra, slip op. at 13-14.

3. Only six years after ratification, the Court, in Chisholm v. Georgia, 2 Dall. 419 (1793), rejected the view advanced by Madison, Marshall and Hamilton, and held that a private citizen could indeed drag a State before the federal courts. "The reaction to Chisholm was swift and hostile.... Within two years of the Chisholm decision, the Eleventh Amendment was ratified...." Welch, supra, slip op. at 14-15.

4. The Eleventh Amendment passed through Congress with little debate or dissent, but one incident deserves comment. The Senate rejected an amendment, offered by Senator Gallatin, that would have excepted from the Eleventh Amendment's bar "cases arising under treaties made under the authority of the United States." 4 Annals of Cong. 30 (1794).

The rejection of Gallatin's amendment refutes the suggestion that the Eleventh Amendment does not bar suits that are based upon the existence of a federal question. - The federal government's interest in cases that arise under treaties, having as they do the potential to embroil the nation in international disputes, is even greater than its interest in cases arising under the federal Constitution or statutes.

See The Federalist, No. 22, p. 197-98; No. 80, 500-01 (B. Wright ed. 1961). It therefore would be bizarre to suppose that the federal courts are empowered to entertain the latter but not the former. And it would be still more bizarre to suppose that the federal courts, barred from hearing federal-question actions brought against a State by citizen of other States, may nevertheless hear them when brought by a State's own citizens.

* * *

The text of the Constitution, the contemporary understanding of it at the time of ratification, the reaction to Chisholm, and the circumstances surrounding the adoption of the Eleventh Amendment--all support, if they do not compel, the conclusion that Hans was correctly decided. Certainly, nothing

in the historical record compels the conclusion that it was not. Union Gas and its amici have simply failed to carry the heavy burden laid on them by stare decisis. See Welch, supra, slip op. at 9.

B. Hans, Far From Having a "Pernicious" Effect, Embodies A Vital Principle of Federalism

Despite the inadequacy of the evidence that Hans was incorrectly decided, Union Gas and its amici insist that Hans nevertheless should be overruled because it is "pernicious." Br. for Resp., p. 25. The ill effects of Hans are said to be two-fold: 1) Hans is said to be doctrinally unsound, spawning "a raft of legal fictions" that

have no principled basis; and 2) Hans enshrines the concept of sovereign immunity, which is said to be outmoded and unjust. Br. for Resp. p. 23-24. Again, they are wrong on both counts.

1. The charge of doctrinal incoherency is not only untrue but irrelevant. Union Gas, its amici and their academic supporters have forgotten that "[t]he life of the law has not been logic: it has been experience." O. Holmes, The Common Law 1 (1881). There is perhaps no area of the law where Holmes' celebrated epigram is so apt.

The hallmark of the Court's Eleventh Amendment jurisprudence is not a finicky intellectual tidiness but the practical accommodation of the competing state and national interests that are inherent in our federal system. Within

this framework, the long line of decisions that follow Hans have developed a stable and predictable body of doctrine that is responsive to these competing interests. Thus, the federal courts may order state officials to conform their future conduct to the requirements of federal law--a power necessary to vindicate the "supreme authority of the United States," Ex parte Young, 209 U.S. 123, 160 (1908), but may not grant relief that would expend itself against a State's treasury, Edelman v. Jordan, supra--a prohibition which is directly responsive to the fears expressed in the ratification debates and which, when fulfilled in Chisholm, led to the adoption of the Eleventh Amendment. On the other hand, and in contrast to a Young-type case, a request for an order

that a state official conform his or her conduct to state law implicates no federal interest, and the Eleventh Amendment therefore bars such an action.

Pennhurst State School & Hospital v. Halderman, supra, at 104-106.⁸

⁸Other aspects of the Eleventh Amendment doctrine, and the ways in which they respond to the needs of our federal system, were summarized by Justice Powell in the plurality opinion in Welch, supra:

The contours of state sovereign immunity are determined by the structure of requirements of the federal system.... First, the United States may sue a State, because that is "inherent in the Constitutional plan." Absent such a provision, "the permanence of the Union might be endangered." Second, States may sue other States, because a federal forum for suits between States is "essential to the peace of

(FOOTNOTE CONTINUED ON NEXT PAGE)

To the extent that this body of doctrine includes legal fictions or anomalies--and that extent is much less than Union Gas would have the Court believe--they are anomalies that are

(FOOTNOTE CONTINUED)

the Union." Third, States may not be sued by foreign states, because "[c]ontroversies between a State and a foreign State may involve international questions in relation to which the United States has a sovereign prerogative." Fourth, the Eleventh Amendment established "an absolute bar" to suits by citizens of other States or foreign States. Finally, "[p]rotected by the same fundamental principle [of sovereign immunity], the States, in the absence of consent, are immune from suits brought against them by their own citizens...."

Welch, supra, slip op. at 17-18 (citations omitted).

inherent in our federal system of dual sovereignty, which is itself an anomaly if one chooses to look at it that way. Its virtue is not its academic rigor, but its practical success in preserving for two centuries the liberties of a free people by diffusing the power of government.

2. Union Gas' attack on sovereign immunity is equally misconceived. It rests ultimately on the proposition that allowing injured persons to sue for compensation is not merely a good thing, but is an overriding value of such transcendent importance that it deserves to be enshrined as constitutional doctrine.

Only a moment's thought is necessary to dispel this fallacy. There are any number of areas where competing

social values outweigh the need for compensation, producing immunities of one kind or another. E.g., United States v. McLemore, supra (sovereign immunity); Imbler v. Pachtman, 424 U.S. 409 (1976) (prosecutorial immunity); Stump v. Sparkman, 435 U.S. 349 (1978) (judicial immunity); Nixon v. Fitzgerald, 457 U.S. 731 (1982) (presidential immunity); Harlow v. Fitzgerald, 457 U.S. 800 (1982) (executive branch immunity); Hustler Magazine v. Falwell, No. 86-1278 (February 24, 1988) (First Amendment immunity).

In the same way, the immunity exemplified by the Eleventh Amendment embodies one of the most fundamental values of our system of government:

a recognition of the fact that the entire country is made up of a Union of separate state governments,

and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

Younger v. Harris, 401 U.S. 37, 44 (1971).

C. Overruling Hans Would Itself Prove "Pernicious."

Far from providing the "salutary" effects foreseen by Union Gas, Br. for Resp., p. 23, overruling Hans would do enormous damage to the life of the nation. First and most importantly, it would, by exposing States to unlimited liability at the will of Congress, further erode the diffusion of power on which the preservation of liberty ultimately rests. In The Federalist, No. 51, Madison wrote that:

In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

Id., at 357 (B. Wright ed. 1961). As Justice Scalia recently reminded, "[t]he framers of the Federal Constitutional...viewed the principle of separation of powers as the absolutely central guarantee of a just government....Without a secure structure of separated powers, our Bill of Rights would be worthless...." Morrison v. Olson, No. 87-1279 (June 29, 1988),

slip op. at 1 (Scalia, J., dissenting). The further centralization which Union Gas calls for can only weaken that structure.

Second, overruling Hans would produce enormous confusion and uncertainty. Congress, the States and the Court have relied on Hans for a century. Overruling Hans would not only call into question at least 17 subsequent decisions of the Court, Welch, supra, slip op. at 24-25, n. 27, but would throw the States into fiscal chaos as they attempt to cope with the flood of claims such a ruling will produce.

Third, the doctrinal instability produced by overruling Hans will not be confined to the area of the Eleventh Amendment. As Pennsylvania discussed

above, supra at 15-17, it is impossible to accept the arguments for overruling Hans without at the same time calling into question the United States' own sovereign immunity. Welch, supra, slip op. at 15-16, n. 17. Finally, to the extent that the Court accepts and constitutionalizes Union Gas' argument that immunity is a "pernicious" doctrine, it will undercut not just the States' immunity, but all of the other forms of immunity discussed, supra, at 28.

III. CONGRESS, ACTING UNDER THE COMMERCE CLAUSE, MAY NOT UNILATERALLY ABROGATE THE STATES' ELEVENTH AMENDMENT IMMUNITY.

In arguing that Congress has unlimited power to abrogate the States' Eleventh Amendment immunity, irrespective of State consent or waiver, Union Gas does not argue that Pennsylvania has consented, either actually or constructively, to private lawsuits under CERCLA. See Br. for Pet., p. 43-46; Pa. Cons. Stat., tit. 42, § 8521(b) (expressly preserving Eleventh Amendment immunity). Nor does Union Gas attempt to deny that its argument, if accepted, would simply eliminate the Eleventh Amendment as a meaningful part of the Constitution. Br. for Pet., p. 32-35. Rather, Union Gas relies primarily on the idea that

the inability of the federal courts to entertain private actions against unconsenting States, somehow eviscerates Congress' ability properly to regulate interstate commerce.⁹

On one level, of course, this argument simply begs the question, Welch, supra, slip op. at 18; on another level, it is simply absurd. Congress does not lack means to induce or coerce States to cooperate in its regulatory schemes. See, e.g., South Dakota v. Dole, No. 86-260 (June 23, 1987); FERC v. Mississippi, 456 U.S. 742 (1982). In

⁹Union Gas also argues that the Court has already settled the question of Congress' power to abrogate the Eleventh Amendment when acting under the Commer Clause, Br. for Resp. p. 25-28, but this is clearly incorrect. Welch, supra, slip op. at 6; see Br. for Pet., p. 28-31.

CERCLA itself, Congress has required that States pay a significant share of cleanup costs as a condition of federal involvement. Supra at 8-9. Suits against States by the United States, or against State officials by private parties, Edelman v. Jordan, supra, provide further weapons against recalcitrant States.

What is at stake here, then, is not the vindication of Congressional authority but the desire of private parties to use the federal courts to gain entry to the ultimate "deep pockets," the State treasuries. To gain that entry, they would have the Court effectively scrap the Eleventh Amendment. The Court should reject their invitation.

CONCLUSION

For the foregoing reasons, Pennsylvania asks the Court to reverse the judgment of the Court of Appeals.

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MAY 26 1988

JOSEPH F. SPANIOLO,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

COMMONWEALTH OF PENNSYLVANIA,

Petitioner.

vs.

UNION GAS COMPANY,

*Respondent.*ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF STATES OF NEW YORK,
CALIFORNIA, CONNECTICUT, GEORGIA,
ILLINOIS, INDIANA, IOWA, KENTUCKY,
MARYLAND, MINNESOTA, MISSOURI,
NEW JERSEY, NEW MEXICO, NORTH
CAROLINA, OKLAHOMA, SOUTH CAROLINA,
TENNESSEE, UTAH, VERMONT, WEST
VIRGINIA, and WISCONSIN AS
AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether Congress possesses the power to subject unconsenting states to private suits for monetary damages in federal court pursuant to the commerce clause of article I of the United States Constitution.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

COMMONWEALTH OF PENNSYLVANIA,
Petitioner.
vs.
UNION GAS COMPANY,
Respondent.

**ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT**

**BRIEF OF STATES OF NEW YORK,
CALIFORNIA, CONNECTICUT, GEORGIA,
ILLINOIS, INDIANA, IOWA, KENTUCKY,
MARYLAND, MINNESOTA, MISSOURI,
NEW JERSEY, NEW MEXICO, NORTH
CAROLINA, OKLAHOMA, SOUTH CAROLINA,
TENNESSEE, UTAH, VERMONT, WEST
VIRGINIA, and WISCONSIN AS
AMICI CURIAE IN SUPPORT OF PETITIONER**

INTEREST OF AMICI CURIAE

The *amici curiae* States of New York, California, Connecticut, Georgia, Illinois, Indiana, Iowa, Kentucky, Maryland, Minnesota, Missouri, New Jersey, New Mexico, North Carolina, Oklahoma, South Carolina, Tennessee, Utah, Vermont, West Virginia, and Wisconsin, submit this brief in support of the

Commonwealth of Pennsylvania's request for reversal of the decision rendered by the United States Court of Appeals for the Third Circuit in *United States v. Union Gas Company*, 832 F.2d 1343 (3d Cir. 1987).

The court of appeals in *Union Gas* held that Congress, in enacting the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("Superfund Act"), 42 U.S.C. §9601 *et seq.* (1982), as amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1987), unilaterally abrogated the states' eleventh amendment immunity pursuant to its powers under the commerce clause of article I of the United States Constitution and, as such, authorized private Superfund suits against states in federal court.¹ The court of appeals made sweeping generalizations in its discussion of Congress' power to subject unconsenting states to private suits in federal court despite the prohibitions of the eleventh amendment. It removed virtually all limitations on such power, leaving Congress free to negate the protections reserved to the states under the eleventh amendment in any statute enacted pursuant to any provision of the Constitution. This holding, in effect, destroys the meaning and purpose of the eleventh amendment.

As the objects of a multitude of potential lawsuits in the Superfund area, as well as in other areas of essential state activity

¹ The court of appeals further held that the language of the Superfund Act, as amended, clearly expressed Congress' intent to abrogate the eleventh amendment. It is the position of *amici* that, irrespective of the authority under which Congress acted in the passage of the Superfund Act, the court erred in its construction of the statute and that the language does not satisfy the "clear language" rule established by *Employees of the Dept. of Public Health and Welfare v. Missouri Dept. of Public Health and Welfare*, 411 U.S. 279, 285 (1973), and strongly reaffirmed in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985) (citing *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 99 (1984)). See most recently *Welch v. Texas Department of Highways and Public Transportation*, 107 S. Ct. 2941, 2947-8 (1987). *Amici* support Petitioner's arguments presented in its brief that the language subject to review by this Court does not represent "an unequivocal expression that Congress intended to override Eleventh Amendment immunity." *Id.* at 2948. The language is intended only to define the extent of state liability to the federal government.

where federal regulation exists, the *amici* states have a substantial interest in the outcome of this case. The court of appeals has broadened the scope of state liability under the Superfund Act and expanded congressional authority to abrogate eleventh amendment immunity. The court, in doing so, has disregarded significant Supreme Court precedent concerning the role of the eleventh amendment in our federal system. The twenty-one *amici* states respectfully urge this Court to reverse the lower court's decision and to restore the protections provided by the eleventh amendment.

SUMMARY OF ARGUMENT

One of the basic tenets of the Constitution as evidenced by the comments of the Framers during the debates on ratification was that the states maintained their sovereignty within the context of the Constitution and the formation of the Republic. In particular, the states required protection from intrusion by a federal judiciary in matters which were considered within their sole province, such as suits by individuals against a state for monetary damages. This protection was intended by article III creating the jurisdiction of the federal judiciary. However, in 1793 when the Supreme Court misinterpreted the extent of federal jurisdiction, the eleventh amendment was swiftly ratified to restore the original meaning of the Constitution. See *Hans v. Louisiana*, 134 U.S. 1 (1890). Since that time, the vitality of eleventh amendment protection has been frequently and consistently reaffirmed and strengthened by this Court. See most recently *Welch v. Texas Department of Highways and Public Transportation*, 107 S. Ct. 2941 (1987).

The eleventh amendment provided unconsenting states with immunity from private suits in federal court. This fundamental protection was subsequently limited by ratification of the fourteenth amendment which clearly contemplates limitations on a state's power and authorizes Congress to enforce those limitations through appropriate legislation. This Court has therefore held that Congress may abrogate eleventh amendment immunity without consent of the states when acting pursuant to the fourteenth amendment. See *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). In reaching this decision, this Court considered the historical basis

for ratification of the fourteenth amendment and its relationship to the eleventh amendment. The Court's reconciliation of the two amendments furthered the purposes of both. An evaluation of the interrelationship between Congress' article I powers, such as the commerce power, and eleventh amendment protection does not lead to a conclusion similar to that in *Fitzpatrick*. Providing unlimited power to Congress to unilaterally abrogate eleventh amendment immunity would render the amendment virtually meaningless and ignore the importance of it in our federal system. Clearly, article I does not empower Congress to abrogate the eleventh amendment without consent of the states.

Consistent with the fundamental rule that states may not be subject to private suits in federal court outside the purview of the fourteenth amendment, this Court has always required the element of state consent where Congress has attempted to abrogate eleventh amendment immunity in enactments under article I. Indeed, the distinction between abrogation under article I and the fourteenth amendment is based upon the requirement under article I for some form of consent on the part of the states. See *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985). Without such consent, any attempt under article I at congressional abrogation of a state's sovereign immunity is invalid.

ARGUMENT

CONGRESS MAY NOT ABROGATE ELEVENTH AMENDMENT IMMUNITY UNDER THE COMMERCE CLAUSE WITHOUT CONSENT OF THE STATES

It has long been a fundamental rule of jurisprudence that a state may not be sued without its consent. *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 98 (1984) (*Pennhurst II*). This Court has consistently reaffirmed that this concept of state sovereign immunity is embodied in the Constitution. *Hans v. Louisiana*, 134 U.S. 1 (1890); *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934); *Welch v. Texas Department of Highways and Public Transportation*, 107 S. Ct. 2941 (1987). Ratification of the Constitution by the several states did not

represent wholesale consent to suit in the federal courts. Indeed, the states retained a substantial measure of sovereignty in their acceptance of the federation. The Constitution likewise does not grant Congress authority to eliminate the immunity of the sovereign states without their consent, except to the extent that the fourteenth amendment imposes limitations on that immunity. See *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

A. The States Did Not Consent to Private Suits in Federal Court By Ratification of the Constitution

Almost one hundred years ago, the Supreme Court, in *Hans v. Louisiana*, reviewed the comments of the Framers in their debates on ratification of the Constitution and concluded that "[a]ny such power as that of authorizing the federal judiciary to entertain suits by individuals against the States, had been expressly disclaimed, and even resented, by the great defenders of the Constitution whilst on its trial before the American people." 134 U.S. at 12. James Madison, discussing section 2 of article III at the Virginia Convention of 1788, expressed his view that creation of the new federal government would not deprive the states of their sovereign immunity from private suits: "It is not in the power of individuals to call any state into court. The only operation...[article III] can have is that, if a state should wish to bring a suit against a citizen [of another state], it must be brought before the federal court." 3 Elliot's Debates 533 (2d ed. 1866).²

² Article III of the United States Constitution provides, in pertinent part:

Section 2. [1] The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between Citizens of different States; – between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

(Footnote continued)

John Marshall similarly interpreted section 2 of article III as conferring federal jurisdiction only in cases where a state would be a plaintiff in an action against citizens of other states:

I hope that no gentleman will think that a State will be called at the bar of the federal court . . . It is not rational to suppose that the sovereign power should be dragged before a court. The intent is, to enable states to recover claims of individuals residing in other states. I contend this construction is warranted by the words. But, say they, there will be partiality in it if a state cannot be defendant — if an individual cannot proceed to obtain judgment against a state, though he may be sued by a state. It is necessary to be so, and cannot be avoided. I see a difficulty in making a state defendant, which does not prevent its being plaintiff.

3 Elliot's Debates 555-6 (2d. ed. 1866).³

Finally, Alexander Hamilton observed that section 2 of article III would not confer jurisdiction in a private suit against an unconsenting state:

[2] In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction . . .

U.S. Const., art. III, §2, cl. 1 and cl. 2.

³ The language of art. III, §2, cl. 2 states that the Supreme Court shall have jurisdiction in all cases "in which a State shall be a Party," just as clause 1 extends federal jurisdiction "to Controversies to which the United States shall be a Party." See n. 2, *supra*. It has been clearly established that the language in clause 1 does not authorize suits against the United States without its consent in light of the doctrine of sovereign immunity. *See Williams v. United States*, 289 U.S. 553, 573 (1933). Similarly, the language in clause 2 concerning the states cannot be construed to override the states' sovereign immunity. Both clauses are to be interpreted to apply only to these parties as plaintiffs. *Monaco v. Mississippi*, 292 U.S. at 321.

...I shall take occasion to mention here, a supposition which has excited some alarm upon very mistaken grounds: It has been suggested that an assignment of the public securities of one state to the citizens of another, would enable them to prosecute that state in the federal courts for the amount of those securities. A suggestion which the following considerations prove to be without foundation.

It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the union. Unless therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the states . . .

The Federalist, No. 81, p. 548-9 (J. Cooke ed. 1961) (emphasis in original).⁴

When the Supreme Court in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), ignored the result intended by article III as presented by the Framers, the "reaction to *Chisholm* was swift and hostile." *Welch*, 107 S. Ct. at 2951. The eleventh amendment was quickly passed by Congress and ratified by the states to nullify the decision's effects. Although its words may appear limiting, in view of the original understanding of the Framers, this Court found that the eleventh amendment "embodies a broad constitutional principle of sovereign immunity." *Id.* at 2952. The eleventh amendment was found to extend to suits in federal court against a state brought by its own citizens, *see Hans v. Louisiana*, 134 U.S. at 15, suits in admiralty, *see Ex parte New York*, No. 1,

⁴ This Court noted in *Welch* that at the New York Convention, a declaration of understanding was appended to the resolution ratifying the Constitution indicating that "[']the Judicial Power of the United States in cases in which a State may be a party, does not extend to criminal Prosecutions, or to authorize any Suit by any Party against a State.[''] 2 Documentary History of the Constitution of the United States of America 194 (1894)." 107 S. Ct. at 2951, n. 14.

256 U.S. 490 (1921), and suits brought by foreign states, *see Monaco v. Mississippi*, 292 U.S. at 328-30. As Justice Marshall stated in his concurring opinion in *Employees of the Department of Public Health and Welfare v. Missouri Department of Public Health and Welfare*, 411 U.S. 279, 291-292 (1973):

[D]espite the narrowness of the language of the Amendment, its spirit has consistently guided this Court in interpreting the reach of the federal judicial power generally, and [“]it has become established by repeated decisions of this court that the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given...[”] [citation omitted].

Furthermore, this Court noted in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238-9, n. 2 (1985) that its “Eleventh Amendment doctrine is necessary to support the view of the federal system held by the Framers of the Constitution. . . . The Framers believed that the States played a vital role in our system and that strong state governments were essential to serve as a ‘counterpoise’ to the power of the Federal Government. . . . The Constitution never would have been ratified if the States and their courts were to be stripped of their sovereign authority except as expressly provided by the Constitution itself.”

Ratification of article III did set forth the states’ consent to suit in the federal judiciary under two limited circumstances. This Court, in *Monaco v. Mississippi*, explained those circumstances in which there was “a surrender of this immunity in the plan of the convention.”⁸ First, the states may sue other states in federal court because such a “scheme of arbitration...was essential to the peace of the Union.” *Id.* at 328. Secondly, a state may be sued by the United States in federal court because it is “inherent in the constitutional plan.” *Id.* at 329.

⁸ Alexander Hamilton, *The Federalist*, No. 81, p. 549 (J. Cooke ed. 1961).

The Constitution, prior to the ratification of the fourteenth amendment, did not grant Congress the authority to affect the states’ sovereignty with respect to private suits in federal court. As this Court stated in *Hans v. Louisiana*, the eleventh amendment “declared that the Constitution should not be construed to impart *any power to authorize the bringing of such suits.*” 134 U.S. at 11 (emphasis added).⁹ As discussed below, the commerce clause in article I, §8, cl. 3 does not authorize Congress to negate eleventh amendment immunity without consent and only the fourteenth amendment provides such grant of power.

B. *The Eleventh Amendment Was Limited Upon Ratification of the Fourteenth Amendment*

Ratification of the fourteenth amendment after the Civil War represented an enlargement of Congress’ power. *Ex parte Virginia*, 100 U.S. 339, 345-6 (1890). “The prohibitions of the Fourteenth Amendment are directed to the States and they are to a degree restrictions of State power.” *Id.* at 346. Furthermore, Congress is specifically authorized in the text of the amendment to enforce the prohibitions contained therein. *See Katzenbach v. Morgan*, 384 U.S. 641, 648 (1965).

When faced with construction of the eleventh amendment together with the fourteenth amendment, this Court found that the latter provided an exception to the fundamental rule that states may not be sued in federal court without their consent. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), held that, in recognition of the unique character of the fourteenth amendment, Congress when acting pursuant to section 5 of the fourteenth amendment may abrogate the eleventh amendment without the states’ consent. By its terms, section 1 of the fourteenth amendment grants individuals certain protections as against the states. Section 5 specifically empowers Congress such that “[it] may, in determining what is [‘]appropriate legislation[’] for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for

⁹ The suit in *Hans v. Louisiana* was brought under an act of Congress conferring jurisdiction on the circuit courts. *See* 134 U.S. at 9.

private suits against States or state officials which are constitutionally impermissible in other contexts." *Id.* at 456 (emphasis added). Thus, the eleventh amendment is "necessarily limited by §5 of the Fourteenth Amendment." *Id.* at 456. *See also Atascadero*, 473 U.S. at 238; *Welch*, 107 S. Ct. at 2946.

Although the Constitution is not necessarily to be read strictly on a timeline, it cannot be ignored that the fourteenth amendment was ratified after and with full awareness of the eleventh amendment. As historical developments have evinced the need for change in this nation's Constitution, amendments have been ratified to effectuate the change. Just as the eleventh amendment is recognized as a limitation on article III jurisdiction, so too is the fourteenth amendment recognized as a limitation on eleventh amendment immunity. The lower court in *Fitzpatrick* stated that, "[t]o the extent that a tension exists between enforcement of rights under the Fourteenth and the state's immunity under the Eleventh, ...[the court's] duty...[was] to reconcile and give effect to both amendments insofar as possible." *Fitzpatrick v. Bitzer*, 519 F.2d 559, 569 (2d Cir. 1975).

This Court has applied this historical balancing to the fifteenth amendment as well. In *City of Rome v. United States*, 446 U.S. 156 (1980), this Court suggested that section 2 of the fifteenth amendment also serves as a foundation for congressional power to abrogate the protection of the eleventh amendment:⁷

We agree...that *Fitzpatrick* stands for the proposition that principles of federalism that might otherwise be an

obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments ["]by appropriate legislation["] Those Amendments were specifically designed as an expansion of federal power and an intrusion on state sovereignty. Applying this principle, we hold that Congress had the authority to regulate state and local voting . . .

Id. at 179.

It can be seen from the Court's analysis in *Fitzpatrick* and *City of Rome* that those amendments passed subsequent to the eleventh amendment which clearly limit state sovereignty by their terms are also tailored to provide Congress with adequate authority to implement those limitations through use of the federal judiciary against unconsenting states. These amendments are very specific and when construed with the eleventh amendment still allow states substantial protection against private suits in federal court. Construing the commerce clause, however, as such a limitation on eleventh amendment immunity is inconsistent with our constitutional history and would drain the amendment of all content.

C. The Commerce Clause Does Not Grant Power to Congress to Unilaterally Abrogate the Eleventh Amendment

The court below held that Congress may abrogate unconsenting states' immunity by exercising its powers under the commerce clause or other plenary powers under article I. The court found that the states surrendered their sovereignty under article I by ratifying the Constitution. *Union Gas*, 832 F.2d at 1355.

Although the states gave up their ability to interfere with interstate commerce and to undertake certain other activities under article I "in order to form a more perfect union," as discussed above, it is clear from the statements of the Framers in conjunction with the ratification of the eleventh amendment that the states did not give their consent to private suits in federal court. The argument that the eleventh amendment merely limited the

⁷ The court of appeals in *Fitzpatrick* cited the case of *Prout v. Starr*, 188 U.S. 537 (1903), as establishing one of the Supreme Court's rules of constitutional construction. 519 F.2d at 569. This Court in *Prout* stated that "[t]he Constitution of the United States, with the several amendments thereof, must be regarded as one instrument, *all of whose provisions are to be deemed of equal validity.*" 188 U.S. at 543 (emphasis added). This suggests a balancing test whereby two seemingly conflicting constitutional provisions would be interpreted to give effect to the purposes of both provisions to the fullest extent possible.

⁸ The fifteenth amendment (concerning right to vote) is structured in a fashion similar to that of the fourteenth. U.S. Const., amend. XV.

power of the judiciary and not the power of Congress is untenable. The Constitution did not authorize Congress to extend the federal courts' jurisdiction to subjects which the courts were expressly prohibited from considering.

To construe the commerce clause, or any other clause under article I, as providing Congress unlimited power to abrogate eleventh amendment immunity not only ignores history but also violates the rules of constitutional construction and interpretation requiring reconciliation of the two provisions. *See Fitzpatrick, supra*, and *City of Rome, supra*. Adoption of such a construction would result in the total rejection of the principles of federalism.

While the reach of the commerce clause has expanded in many areas over recent years, it does not follow that there are *no* limits on the commerce clause power. In fact, in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 547 (1985), which held that the tenth amendment provided little barrier to legislation validly enacted pursuant to the commerce clause, this Court recognized that the Constitution's federal structure imposed limitations on the commerce clause. *Id.*

The tenth amendment is a general reservation to the states of power "not delegated to the United States by the Constitution . . ." U.S. Const., amend. X. The amendment was found to present no specific limitation on Congress' delegated powers. *Id.* at 557. In contrast, the eleventh amendment clearly enunciates a specific limitation on these delegated powers, *i.e.*, that Congress may not expand federal jurisdiction to include private suits against unconsenting states when legislating under these powers.⁹ As Justice

⁹ A significant number of lower courts have held that Congress may not subject an unconsenting state to suit in federal court under article I. *United States v. Freeman*, 680 F. Supp. 73 (W.D.N.Y. 1988) (specifically rejecting the court of appeals' decision in *Union Gas*); *Collins v. Alaska*, 823 F.2d 329, 332 (9th Cir. 1987); *Richard Anderson Photography v. Radford University*, 633 F. Supp. 1154, 1158 (W.D. Va. 1986) (article I copyright and patent clause); *Dunlop v. Minnesota*, 626 F. Supp. 1127, 1129 (D. Minn. 1986) (no abrogation where "plaintiffs offer no argument that the Social Security Act was passed under section (Footnote continued)

Stevens has stated, "Congress may not, of course, transcend specific limitations on its exercise of the commerce power that are imposed by other provisions of the Constitution." *E.E.O.C. v. Wyoming*, 460 U.S. 226, 248 (1983) (Stevens, J., concurring).

In sum, "the most natural understanding of the Eleventh Amendment [is] that its central purpose was to reaffirm the principle – one that is not inconsistent with its 'common law' status – that the only legislatures with power to consent to suit in federal court are those of the states[.]" *Hart and Wechsler, The Federal Courts and The Federal System* at 231 (2nd ed.) (1981 Supp.). The fourteenth amendment and other similar post-eleventh amendment revisions to the Constitution are the only limitations on the states' immunity from suits by private citizens. There is no other source for extending article III judicial power in a suit by an individual against an unconsenting state.

5 of the Fourteenth Amendment"); *Mihalek Corp. v. State of Michigan*, 595 F. Supp. 903, 905-06 (E.D. Mich. 1984), *aff'd.*, 814 F.2d 290 (6th Cir. 1987) (article I copyright and patent clause); *Sanders v. Marquette Public Schools*, 561 F. Supp. 1361, 1372 (W.D. Mich. 1983) ("There is no showing that the [Federal Rehabilitation] Act was passed pursuant to Congress' 'enforcement power' under section 5 of the Fourteenth Amendment. Consequently, there has been no implied repeal of the immunity otherwise enjoyed by the States."); *Farkas v. New York State Dept. of Health*, 554 F. Supp. 24, 27-28 (N.D.N.Y. 1982) ("This Court finds that the ADEA [Age Discrimination in Employment Act] was enacted pursuant to the Commerce Clause of the Constitution and not the Fourteenth Amendment.... [T]he eleventh amendment precludes an award of back pay against a state for violation of the provisions of that Act."); *Basiley v. Ohio State University*, 487 F. Supp. 601, 606 (S.D. Ohio 1980) ("Congress did not enact 28 U.S.C. §1331 pursuant to §5 of the Fourteenth Amendment, and a federal court has no similar power to abrogate eleventh amendment immunity..."). *Contra, McVey Trucking, Inc. v. Secretary of State of Illinois*, 812 F.2d 311, 314-23 (7th Cir.), *cert. denied*, 108 S. Ct. 227 (1987) (article I bankruptcy clause); *Peel v. Florida Dept. of Transportation*, 600 F.2d 1070, 1074-82 (5th Cir. 1979) (article I war power clause); *Mills Music, Inc. v. Arizona*, 591 F.2d 1278, 1283-86 (9th Cir. 1979) (article I copyright and patent clause).

D. This Court Has Consistently Held That State Consent is Required Under Article I Enactments To Limit Eleventh Amendment Protection

Consistent with the contention of *amici* presented above that Congress does not possess the power to unilaterally abrogate eleventh amendment protection under article I of the Constitution, this Court has required the element of state consent in each case in which it considered limitations on the eleventh amendment created by the operation of statutes outside the sphere of the fourteenth amendment. Specifically, this Court has indicated that limitations on eleventh amendment immunity may be found in these cases only if Congress has acted in these statutes to induce states to waive their immunity by their participation in certain activities regulated under the statutes. The participation by the states in these activities might then be interpreted as constituting an implied waiver of the eleventh amendment if the participation is voluntary with full knowledge of the consequences. *See Edelman v. Jordan*, 415 U.S. 651, 672 (1974).

The theory of implied waiver was first announced by this Court in *Parden v. Terminal R.R. Co.*, 377 U.S. 184 (1964), which concerned a statute enacted pursuant to the commerce clause.¹⁰ Of course, a state does not impliedly waive its immunity simply by operating in a federally regulated sphere. Congress must first express itself in "clear language" if it wishes to condition a state's participation in an activity subject to federal regulation "on the forfeiture of immunity from suit in a federal forum." *Employees*, 411 U.S. at 285.¹¹ Only after such clear expression by Congress

¹⁰ This Court in *Welch*, 107 S. Ct. at 2948, overruled *Parden* to the extent that it was "inconsistent with the requirement that an abrogation of Eleventh Amendment immunity by Congress must be expressed in unmistakably clear language . . ." *Parden* continues to stand for the proposition that, under certain circumstances, Congress may condition state activities upon waiver of eleventh amendment protections, even though *Welch* considered the specific statute in *Parden* insufficient with respect to the "clear language" standard. *Id.*

¹¹ *Amici* of course contend that the Superfund Act, the subject of this review, does not present "clear language". See n. 1, *supra*.

may it then be determined whether the extent of the state's participation in that activity constitutes an implied waiver of the eleventh amendment.¹²

Congress' attempts to affect the constitutional protections of the eleventh amendment under the spending clause, U.S. Const., art. I, § 8, cl. 1, have also been considered by this Court. Again, waiver by the states was regarded as a critical element in determining whether eleventh amendment protections remained available to the states under statutes enacted pursuant to the spending clause. "The legitimacy of Congress' power to [abrogate the eleventh amendment]...under the spending power...rests on whether the State voluntarily and knowingly accepts [those]...terms." *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981) (*Pennhurst I*). The "analysis relevant to Spending Clause enactments," assuming the "clear language" test is met, therefore focuses on whether a state by its participation in a program authorized by Congress has in effect consented to the abrogation of eleventh amendment immunity. *Atascadero*, 473 U.S. at 246-7, n. 5.

The distinction established by this Court between abrogation under article I and the fourteenth amendment is therefore based upon the requirement under article I for some cognizant waiver of eleventh amendment immunity by a state's action. The court of appeals attempts to wipe out this requirement and by

¹² The state activity at issue in *Parden* was operation of a railroad for profit, an activity outside the scope of normal governmental function. 377 U.S. at 195. In contrast, the activity in the case before this court was a dredge and fill operation undertaken by Pennsylvania in the Brodhead Creek to alleviate flooding which had occurred in the area. In light of this Court's reluctance to find forfeiture of eleventh amendment immunity, a state's involvement in providing an essential service for the public welfare should never be construed as providing the requisite consent to waiver of the eleventh amendment. "To suggest that the State had the choice of either ceasing operation of these vital public services or ['consenting'] to federal suit suffices... to demonstrate that the State had no true choice at all..." *Employees*, 411 U.S. at 296 (Marshall, J., concurring).

doing so destroys the fundamental protections afforded to the states by the eleventh amendment.¹⁹

CONCLUSION

With the exception of certain post-eleventh amendment constitutional revisions, the states, in ratifying the Constitution and subsequently the eleventh amendment, did not intend to retain anything less than absolute immunity from all suits by private citizens in federal court. "The principal that the jurisdiction of the federal courts is limited by the sovereign immunity of the States' is, without question, a reflection of concern for the sovereignty of the States . . ." *Atascadero*, 473 U.S. at 238-9, n. 2 (citation omitted). The history of this immunity, as recited by the founding fathers of this nation and reflected in the opinions and holdings of this Court, leads inexorably to the conclusion that the federal courts have no jurisdiction in the matter before this Court and that Congress does not possess the power to grant such jurisdiction over this suit.²⁰ For these reasons and on the basis of all the arguments set forth above, this Court should reverse the decision of the court below.

Dated: New York, New York
May 26, 1988

Respectfully submitted,

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¹⁹ The relevant activities of the Commonwealth of Pennsylvania in this case were completed several years before the enactment of the applicable portion of the Superfund Act. No action on the part of the Commonwealth could be construed so as to constitute implied consent or a knowing waiver of its eleventh amendment immunity. See Petitioner's Brief. In view of significant Supreme Court precedent, it can only be concluded that such forfeiture of immunity may never be implied retroactively prior to enactment of the statute which attempts the forfeiture. See *Pennhurst I*, 451 U.S. at 17.

²⁰ Respondent Union Gas Company is not without a remedy in this matter. This type of litigation for monetary damages is exactly the type which the Framers determined long ago is more appropriately handled by the state courts. The eleventh amendment was designed to preserve federalism and to protect states from unwarranted intrusions by federal courts into state treasuries. Only the states themselves should decide such matters. *Pennhurst II*, 465 U.S. at 99.

No. 87-1241

Supreme Court, U.S.

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In The
Supreme Court of the United States
October Term, 1987

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COMMONWEALTH OF PENNSYLVANIA,
Petitioner,
v.

UNION GAS COMPANY,
Respondent.

—0—
On Writ of Certiorari to the United States
Court of Appeals for the Third Circuit

—0—
**AMICUS CURIAE BRIEF OF PACIFIC LEGAL
FOUNDATION IN SUPPORT OF RESPONDENT**

—0—
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In The
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COMMONWEALTH OF PENNSYLVANIA,
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UNION GAS COMPANY,
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On Writ of Certiorari to the United States
Court of Appeals for the Third Circuit

**AMICUS CURIAE BRIEF OF PACIFIC LEGAL
FOUNDATION IN SUPPORT OF RESPONDENT**

INTRODUCTION

Pursuant to Supreme Court Rule 36, Pacific Legal Foundation (PLF) respectfully submits this amicus curiae brief in support of respondent, Union Gas Company (Union Gas). Written consent to the filing of this brief has been granted by counsel for both parties. Copies have been lodged with the clerk.

INTEREST OF AMICUS CURIAE

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of litigating in the public interest. PLF policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The Board authorizes active PLF involvement in a case only when there is broad community support. PLF's Board of Trustees has authorized the filing of an amicus curiae brief in this matter.

PLF believes that absolute state sovereign immunity, in this case, would be contrary to the intent of Congress, undermine the cleanup objectives of "Superfund," further impair individual rights and free enterprise, and erode confidence in our system of government. PLF has litigated numerous cases involving similar issues. PLF's public policy perspective and litigation experience will provide a valuable additional viewpoint in this critical case.

o

OPINION BELOW

The opinion of the United States Court of Appeals is cited as *United States v. Union Gas Company*, 832 F.2d 1343 (3rd Cir. 1987).

o

STATEMENT OF THE CASE

From 1890 until 1948 an industrial plant was operated adjacent to Brodhead Creek in Stroudsburg, Pennsylvania. The plant produced coal gas with coal tar as a by-product. The coal tar was buried on-site in a manner now

regarded by the Environmental Protection Agency (EPA), in its Amended Fund Authorization Report, as state of the art technology for the time. Control of the plant site changed hands several times until, in 1978, Union Gas obtained ownership of the property via merger.

Pursuant to a flood control easement, the State of Pennsylvania, between 1960 and 1962, rechanneled, narrowed, and deepened Brodhead Creek and erected dikes on its sides. The rechannelization of the fast flowing stream caused eventual downcutting of the creek and erosion at the toe of one of the dikes. In October of 1980 the state was excavating along the creek (to repair the damage caused by erosion) which led to the discharge of coal tar into the creek from the adjacent plant site. The spill area was designated by EPA as the nation's first Superfund site under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9601, *et seq.*, Pub. L. No. 96-510. A cleanup of the site ensued from April, 1981, to January, 1982, at a reputed cost to the United States government of \$967,000.

On May 23, 1983, EPA sued Union Gas in the United States District Court for the Eastern District of Pennsylvania to recover its cleanup costs. Union Gas, in turn, filed a third party complaint against both Pennsylvania and the Borough of Stroudsburg alleging they were liable as facility owners or operators within the meaning of CERCLA, 42 U.S.C. § 9601(20)(A), and negligently caused or contributed to the release of the coal tar. The state moved to dismiss the third party complaint alleging it was immune to suit under CERCLA due to the Eleventh

Amendment of the United States Constitution. The District Court granted the state's motion.

The District Court also dismissed the action against the municipality when EPA, Union Gas, and the Borough of Stroudsburg agreed to settle, with Union Gas paying the major portion of the cost of cleanup. Union Gas then appealed the District Court's dismissal of Pennsylvania as a third party defendant. The United States Court of Appeals for the Third Circuit affirmed the District Court decision and determined that CERCLA did not clearly abrogate state Eleventh Amendment immunity.

On October 17, 1986, shortly after Union Gas filed a petition for writ of certiorari with this Court, the President signed into law the Superfund Amendments and Re-authorization Act of 1986 (SARA) (in combination with CERCLA, Superfund, or the Act), 42 U.S.C. § 9601, *et seq.*. Pub. L. No. 99-499. This Court granted certiorari, vacated the Court of Appeals' opinion, and remanded for consideration in light of SARA. On remand, the Third Circuit unanimously reversed the District Court. The Court of Appeals held that (1) the language of CERCLA, as amended by SARA, clearly abrogated state immunity; (2) Congress may abrogate the Eleventh Amendment under its Article I Commerce Power; and (3) Union Gas' cause of action under CERCLA, as amended by SARA, applies retroactively.

SUMMARY OF THE ARGUMENT

Pennsylvania argues it cannot be sued in federal court by Union Gas due to Eleventh Amendment sovereign immunity. In this case, however, state sovereign immunity

would intrude on the ideal of liberty under law and unjustly protect the state from the consequences of its illegal act—the unauthorized release of a hazardous substance. Such a precedent would unduly limit the ability of Congress to take the steps necessary to protect the public health and the environment.

Congress expressed its intent to abrogate Eleventh Amendment immunity in CERCLA in 1980 when it defined liable "person" to include states. 42 U.S.C. §§ 9601(21) and 9607(a). Congress expressed its intent even more clearly in 1986 through SARA. "[A] State or local government shall be subject to the provisions of this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title." 42 U.S.C. § 9601(20)(D).

Sovereign immunity, for a state that was an active agent in the creation of a chemical spill, should not be exalted above the interest of the people, the true sovereign, in protecting themselves from oppressive governmental acts. Nor should this Court fear that state liability will deprive the people of an essential public service. That concern, expressed by Justice Marshall in *Employees of the Department of Public Health & Welfare v. Department of Public Health & Welfare*, 411 U.S. 279 (1973), is simply not applicable here. It was only when the state caused the spill that it fell under the scope of Superfund, not before, while engaged in flood control operations. Pennsylvania need not give up its sovereign immunity to provide flood protection or any other public service.

While acting for the public welfare, however, the state assumes a special duty. Pennsylvania had a constitutional

duty not to create a public burden and force it upon a private party. The cost of cleanup, necessitated by the state-induced spill, was a burden that properly should have been borne by the public as a whole and not shouldered by Union Gas alone. The state unfairly shifted the economic burden of its own illegal act onto an innocent landowner, without compensation, and thereby caused a taking in violation of the Fifth Amendment of the Constitution. *See Armstrong v. United States*, 364 U.S. 40 (1960).

Also, Pennsylvania must not be permitted to escape any retroactive application of the Act due to lack of notice. The state is not proffered the same due process protections as a private person under the Fifth Amendment. *See South Carolina v. Katzenbach*, 383 U.S. 301, 323 (1966). It would undermine confidence in our legal system and constrain free enterprise if the state were to avoid financial responsibility for its own affirmative acts while Union Gas, a nonnegligent private party, is held liable for cleanup costs it did not cause.

Moreover, state immunity in this case would diminish the deterrent effect of Superfund and the economic incentive to guard against state created pollution. If the state can foist the cost of cleanup on private parties, the state need not undertake an expensive cleanup rapidly and voluntarily. This would undermine the objectives of the Act at a time when such efforts are essential. Federal government resources are grossly inadequate to cope with an estimated 10,000 hazardous waste sites requiring close to \$100 billion to clean up. States must become financially responsible for environmental hazards they create.

If this Court is to accommodate the competing interests of protecting innocent citizens from the consequences

of illegal state acts while protecting state sovereign immunity, this Court should not adopt an absolute consent rule for abrogation of the Eleventh Amendment under the Commerce Clause. Rather, the Court should consider three policy factors to determine if state consent is required in a particular case: (1) the nature and strength of the policy interest served by the statute, (2) the extent to which the statute abrogates the Eleventh Amendment, and (3) the nature of the right which the statute alters.

In this case, the interest in public health and environmental protection advanced by Superfund is substantial and urgent; abrogation of the Eleventh Amendment, under the Act, is limited to liability in federal court for states that are actively responsible for a spill; and the right to sue is only for fair contribution. Therefore, state sovereign immunity should be abrogated, without the need for consent, if Congress is deemed to have clearly expressed such intent in the Act. Such a holding, however, need not be extended beyond the particular circumstances of this case.

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ARGUMENT

I

ABSOLUTE STATE SOVEREIGN IMMUNITY WOULD IMPINGE ON INDIVIDUAL RIGHTS AND IMPEDE THE PURPOSES OF SUPERFUND

In his dissent in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), Justice Brennan notes that this Court has repeatedly relied on *Hans v. State of Louisiana*, 134 U.S. 1 (1890), as establishing a broad principle of state immunity from suit in federal court. He also notes that

the historical record demonstrates the *Hans* ruling rested on misconceived history and misguided logic. Ultimately, he states:

"If this doctrine [of state immunity] were required to enhance the liberty of our people in accordance with the Constitution's protections, I could accept it. If the doctrine were required by the structure of the federal system created by the Framers, I could accept it. Yet the current doctrine intrudes on the ideal of liberty under law by protecting the States from the consequences of their illegal conduct. And the decision obstructs the sound operation of our federal system by limiting the ability of Congress to take steps it deems necessary and proper to achieve national goals within its constitutional authority." *Atascadero*, 473 U.S. at 302.

Putting aside any argument about whether Justice Brennan's assessment of *Hans* is correct, his expression of the goal of judicial decision making is unassailable. This Court should seek an end, within constitutional bounds, which enhances liberty and does not unduly constrain the ability of Congress to achieve legitimate national goals. In this case, the proper end is to find the State of Pennsylvania liable for its contribution to a coal tar spill in Brodhead Creek. The national goal is to protect public health and the environment by deterring spills and fostering rapid and voluntary cleanup. If this Court reverses the lower court, it will undermine individual liberties and obstruct the congressional objective.

A. Congress Intended to Abrogate State Immunity

Whatever the standard is for abrogation of Eleventh Amendment immunity, it must be acknowledged that Congress intended, under Superfund, to hold states liable on

a par with all other responsible parties. The 1980 Act, 42 U.S.C. § 9601, *et seq.*, read in part:

"'[P]erson' means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, *State*, municipality, commission, political subdivision of a *State*, or any interstate body." 42 U.S.C. § 9601(21) (emphasis added).

"... [A]ny person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of... shall be liable for... any other necessary costs of response incurred by any other person consistent with the national contingency plan...." 42 U.S.C. § 9607(a)(2), (4), and (4)(B).

The 1986 amendments, 42 U.S.C. § 9601, now read in part:

"The term 'owner or operator' does not include a unit of State or local government which acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign. The exclusion provided under this paragraph shall not apply to any *State* or local government which has *caused or contributed* to the release or threatened release of a hazardous substance from the facility, and such a *State* or local government shall be *subject* to the provisions of this chapter *in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title.*" 42 U.S.C. § 9601(20)(D) (emphasis added).

This language is clear and reasonable. It only makes good sense to hold states equally liable for spills they have

either caused or to which they have contributed. In this case, Pennsylvania was an active participant in the spill event. Its flood control activities undermined the stream bank which led directly to the discharge into the creek. There is no countervailing national interest which weighs heavier than the public interest to see state polluters liable to their own citizens in federal court. Anything less would mock justice and undercut the intent of the people, the true sovereign, to protect themselves through the Constitution from oppressive and inequitable governmental acts, federal, or state.

B. Abrogation of Sovereign Immunity Will Not Impair a Public Service

This Court should not be reluctant to find state liability here for fear of any chilling effect on state provided services. The problem this Court found in *Employees of the Department of Public Health & Welfare v. Department of Public Health & Welfare*, 411 U.S. 279, is absent in this case. In *Employees*, certain hospital and school workers brought suit against the state, in federal court, for overtime compensation due to them under the Fair Labor Practices Act (FLPA). The state claimed sovereign immunity under the Eleventh Amendment. Because liability was sought on the basis of state operation of hospitals and schools which predated the Act, the Court was concerned that the State of Missouri would have to either give up established facilities, services, and programs or else consent to federal suit. Speaking for the Court, Justice Marshall considered this no choice at all and upheld state immunity.

“To suggest that the State had the choice of either ceasing operation of these vital public services or

‘consenting’ to federal suit suffices, I believe, to demonstrate that the State had no true choice at all and thereby that the State did not voluntarily consent to the exercise of federal jurisdiction in this case.” *Employees*, 411 U.S. at 296.

In the present case, however, Pennsylvania was not faced with either giving up an essential public service or else consenting to federal suit. Although Pennsylvania was engaged in flood control operations, an essential public service, at Brodhead Creek when it caused the discharge, this was not the activity which Superfund regulated. Unlike Missouri, which was regulated by FLPA in the very operation of its schools and hospitals, the State of Pennsylvania fell under the purview of Superfund and became subject to liability only when it participated in the spill. Pennsylvania was and is free to engage in flood control activities without ever entering the sphere regulated by the Act. It need only refrain from perpetrating a spill.

C. The State Cannot Take Private Property Without Compensation

The principle embodied in the Fifth Amendment, and made applicable to the states via the Fourteenth Amendment, that private property shall not be taken for public use without compensation is well established. In *Armstrong v. United States*, 364 U.S. at 49, this Court stated that the purpose of forbidding uncompensated takings of private property for public use is “to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”

Here, the State of Pennsylvania caused a spill while performing dredge and fill operations to provide flood

protection to the public. The economic burden for providing this essential public service is now being borne by a private party, Union Gas. Can there be a more obvious public burden than that created by a state when acting for the public welfare? Clearly, in the face of the principle enunciated in *Armstrong*, and in the circumstances of this case, this Court cannot elevate sovereign immunity, notwithstanding the Eleventh Amendment, over the individual rights guaranteed by the Fifth and Fourteenth Amendments. Pennsylvania must not be allowed to intrude on constitutionally protected rights and force Union Gas, an innocent landowner, to use its private funds to bear the cost of cleaning up a public spill which, in all fairness and justice, should be borne by the public as a whole from the state treasury.

Where a state has contributed to an environmental or public health risk, the state should bear a proportionate share of the cost of amelioration. Clearly, nonnegligent private parties should not have to pay for improper governmental actions. In this and other similar situations the state should be held liable on the same basis as private parties. This Court must not permit the state to unfairly shift public burdens to others in violation of constitutionally protected personal property rights and to the detriment of accustomed economic freedoms.

D. Lack of Notice Does Not Preclude State Liability

Pennsylvania must also not be allowed to avoid liability on the ground that Superfund may not be retroactively applied without violating the state's right to notice. Any notice right the state may be deemed to have under the

Eleventh Amendment must not be given greater deference than the notice right private parties can claim under the Fifth and Fourteenth Amendments.

Currently, however, individual notice rights under Superfund are not recognized. The lower courts have found it is not an unconstitutional deprivation of due process rights for generators, transporters, and landowners to be held retroactively liable for spill cleanup even when hazardous waste disposal was earlier completed in conformance with or as mandated by prior law. *United States v. Northeastern Pharmaceutical & Chemical Co., Inc.*, 810 F.2d 726 (8th Cir. 1986). If this Court cannot find retroactive liability for the State of Pennsylvania it must also not allow retroactive liability for Union Gas.

It would violate all notions of fairness and equity if the state were to find protection in the Constitution from the consequences of its own *illegal* acts while a private party finds no protection in the Constitution for its *legal* acts but is made to pay for the illegal acts of the state. In this case Pennsylvania was affirmatively at fault; it caused the spill. Union Gas was an innocent landowner. The in ground disposal of coal tar at the Union Gas site, from 1890 to 1948, is regarded by EPA, in its Amended Fund Authorization Report, as state of the art technology for the early part of this century. It would be anomalous for Union Gas to be retroactively liable without fault while Pennsylvania is allowed to pollute with seeming impunity.

Notwithstanding the lower court decisions to the contrary, it is patently unjust when, as under Superfund, retroactive liability is applied strictly (without regard to fault) and without any financial limit or chronological

boundary. Retroactive liability of the magnitude imposed under Superfund will only be just when applied to parties who are at fault, like the State of Pennsylvania. Otherwise, it serves only to provide a few "deep pockets" from which to ease the public burden.

The imposition of strict retroactive liability on non-negligent parties, like Union Gas, creates insidious and uncertain economic risks which further weaken an already waning entrepreneurial spirit and unnecessarily constrain free enterprise. Moreover, it robs innocent citizens of their reasonable expectations of justice and security. This Court must not compound the injustice done to Union Gas by allowing Pennsylvania to escape liability for lack of notice.

E. State Sovereign Immunity Would Impede the Objectives of Superfund

If states are held immune from the consequences of their illegal acts, the deterrent effect of Superfund will be greatly diminished. States will have only a limited incentive to guard against state created pollution. Also, where a state perceives no potential liability for a spill of its own making, but can expect a private party to be liable, the state will have no economic incentive to undertake an expensive cleanup rapidly and voluntarily. This outcome would threaten the congressional objective of protecting the environment and fostering voluntary cleanup.

"The legislation [CERCLA] would . . . enable the Administrator to pursue rapid recovery of the costs incurred for the . . . actions undertaken by him from persons liable therefor and to induce such persons voluntarily to pursue appropriate environmental response actions with respect to inactive hazardous

waste sites." H.R. Rep. No. 96-1016, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. Code Cong. & Admin. News 6119, 6120.

In 1979, EPA estimated that as many as 30,000 to 50,000 hazardous waste sites existed in this country. Approximately 1,200 to 2,000 were considered to present serious risks to public health. The cleanup cost for all the sites was estimated at between \$13.1 and \$22.1 billion. *See* H.R. Rep. No. 96-1016, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. Code Cong. & Admin. News at 6120-23. Later, EPA assessed the problem to be much more severe. In 1986, the Office of Technology and Assessment estimated there may be as many as 10,000 potential Superfund sites across the nation. These sites range from industrial plants to government dumps. The total cost for completing the Superfund program is expected to be as much as \$100 billion. Congress understood that even with the \$10 billion added to Superfund by SARA that "EPA will never have adequate monies or manpower to address the problem itself." For this reason, SARA was introduced to enhance EPA's response and enforcement authority. An underlying principle of SARA is that "Congress must facilitate cleanups of hazardous substances by the responsible parties while assuring a strong EPA oversight role with a set of tough legal enforcement standards." *See* H.R. Rep. No. 99-253(I), 99th Cong., 2d Sess., *reprinted in* 1986 U.S. Code Cong. & Admin. News 2835, 2836-37.

Abrogation of the Eleventh Amendment, to allow state liability for its spills in federal court, is a tough enforcement standard. But it is necessary. This nation cannot afford to allow any responsible party to shirk its duty to pay, to the extent of its contribution, for the cleanup of a

spill it actively caused. This Court should uphold the intent of Congress to protect the public health and the environment by holding all responsible parties liable to the limits of the Constitution. In this case, the Eleventh Amendment should not be a limit on the state's liability.

II

TO ACHIEVE A JUST BALANCE BETWEEN INDIVIDUAL AND STATES' RIGHTS THIS COURT MUST NOT APPLY AN ABSOLUTE ELEVENTH AMENDMENT ABROGATION STANDARD

Beyond the specific implications any decision in this case will have on private parties and the states with regard to spill cleanup, this Court must come to terms with the more general precedential effects this case will have on Eleventh Amendment and Article I law. Petitioner, Commonwealth of Pennsylvania, has described one of the main issues in this case as a question of "whether Congress, acting under the Commerce Clause, may abrogate the Eleventh Amendment unilaterally, that is, without any corresponding waiver or consent on the part of affected States." Petitioners' brief at 28. Of course, a consideration of this issue supposes that Congress has clearly expressed its intent to abrogate sovereign immunity in the Act.

If, on the one hand, this Court determines that, under the Commerce Clause, Congress may abrogate the Eleventh Amendment unilaterally, as all parties concede it has a right to do under the Fourteenth Amendment, this Court would seriously jeopardize the fundamental doctrine of federalism, or states' rights. The power of Congress under the Commerce Clause is already so pervasive as to

approach a general police power. Any further extension of that power could impair personal freedoms and subject states to liability at the virtual whim of Congress for acts which could not now be conceived as a basis for future liability.

If, on the other hand, this Court determines that Congress may not abrogate the Eleventh Amendment unilaterally, that consent by the state must be given, this Court runs the risk of trammeling individual liberties and constitutional notions of fairness and justice and frustrating the objectives of Congress to hold responsible parties liable and protect the environment.

This Court, therefore, should avoid adopting an absolute standard for determining abrogation of Eleventh Amendment immunity under the Commerce Clause. Rather, this Court should consider certain policy factors to determine whether consent is required in a particular case when Congress has clearly expressed its intent to abrogate sovereign immunity. Only in this way can the Court avoid an injustice in a highly precedential case and, at the same time, withhold a sweeping decision on sovereign immunity which may eviscerate the Eleventh Amendment and undermine principles of federalism. The Court should at least consider (1) the nature and strength of the policy interest served by the statute, (2) the extent to which the statute abrogates the Eleventh Amendment, and (3) the nature of the right which the statute alters. For a discussion of these factors in a different context—as applied to retroactive liability of a statute—see *Flournoy v. State of California*, 230 Cal. App. 2d 520 (1964).

The nature and strength of the policy interest served by Superfund is clear—the protection of the public from

hazardous chemical substances. Cleaning up approximately 10,000 Superfund sites at a cost of \$100 billion is "one of our most pressing environmental problems." H.R. Rep. No. 99-253(I), 99th Cong., 2d Sess., *reprinted in* 1986 U.S. Code Cong. & Admin. News at 2836-37.

The extent to which the statute abrogates the Eleventh Amendment is minimal. Superfund does not abrogate state sovereign immunity across the board under the Commerce Clause. Rather, it allows the state to be sued in federal court, by one of its own citizens, only in that limited circumstance where the state is a responsible party to a spill. The state will not be required to either give up an essential service or subject itself to liability. It must merely refrain from being a participant in a spill event.

The nature of the right which the statute alters is the right of the private party to sue the state in federal court. This right is not a windfall for the private party. In this case the state is liable only for its contribution to the spill.

When these three factors are weighed together in this case the scales tip in favor of allowing abrogation of the Eleventh Amendment, without state consent. The public interest is great, suit in federal court is limited, and the right to sue subjects the state only to liability for its contribution to the spill.

A proper ruling in this case would hold Pennsylvania liable to Union Gas in federal court, but would not create a sweeping precedent for abrogation of Eleventh Amendment immunity under Congress' Article I Commerce Power.

CONCLUSION

As the final stronghold for the protection of individual and states' rights, this Court should maintain a just balance between the shield of the Eleventh Amendment and state liability for its own illegal acts. The public interest advanced by Superfund and the individual safeguards granted the citizens of this country by the Constitution should not be sacrificed for the sake of sovereign immunity. For the reasons stated above, this Court should rule for respondent, Union Gas.

DATED: July, 1988.

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No. 87-1241

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

v.

UNION GAS COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

BRIEF *AMICI CURIAE* OF
THE ASSOCIATION OF AMERICAN PUBLISHERS, INC.
AND THE ASSOCIATION OF
AMERICAN UNIVERSITY PRESSES, INC.
IN SUPPORT OF RESPONDENT

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**BRIEF *AMICI CURIAE* OF
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AND THE ASSOCIATION OF
AMERICAN UNIVERSITY PRESSES, INC.
IN SUPPORT OF RESPONDENT**

The Association of American Publishers, Inc. ("AAP") and the Association of American University Presses, Inc. ("AAUP") respectfully submit this brief *amici curiae* in support of Respondent. By writings filed with the clerk, Petitioner and Respondent have consented to the filing of this brief.

INTEREST OF *AMICI CURIAE*

AAP is a trade association of book publishers. Its approximately 300 members publish between 70% and 75% of the dollar volume of all books published in the United States. Its members' publications include text, technical and reference books, as well as works of fiction and general non-fiction.

The Association of American University Presses, Inc. is a not-for-profit association of university presses. Its 80 members include the presses of virtually every distinguished university in the United States, as well as several Canadian and international scholarly publishers.

Amici, as well as copyright owners generally, have a direct and compelling interest in the question presented in this case concerning the extent of congressional power to abrogate Eleventh Amendment immunity. Their livelihood depends in large part on widespread observance of the property rights guaranteed by § 106 of the Copyright Act, and on the availability of judicial relief from violations of these rights. AAP and AAUP members market their copyrighted works to states and state entities, and protection of the rights granted to them by Congress depends in large measure on their ability to require these customers to comply with the copyright laws equally with other customers in the private market. Some recent cases construing the Eleventh Amendment, which threaten to effectively exempt states from the copyright laws, together with assertions by the Attorneys General of several states that appear to claim broad immunity for state entities from liability for copyright infringement, have endangered these rights.

AAP and AAUP have no expertise concerning "Superfund" issues and this brief does not discuss them. It focuses exclusively on the power of the Congress to abrogate Eleventh Amendment immunity under Article I of the Constitution. That power is vital to maintaining an important marketplace for copyrighted works.

SUMMARY OF ARGUMENT

Congress has the power to abrogate states' Eleventh Amendment immunity whenever it enacts legislation under its plenary authority, including the authority found in such diverse provisions of Article I of the Constitution as those covering interstate commerce, bankruptcy, and copyright matters. This Court has never held otherwise. A decision to do so here would not only deprive Respondent of a federal forum for seeking relief from Petitioner in the instant controversy. It might

deprive copyright owners of *any* forum in which to seek effective relief for copyright infringement from states and state entities.

ARGUMENT

ARTICLE I OF THE CONSTITUTION EMPOWERS CONGRESS TO ABROGATE THE STATES' IMMUNITY TO SUITS FOR DAMAGES IN FEDERAL COURTS

In most Eleventh Amendment cases, "the issue is not the general immunity of the States from private suit . . . but merely the susceptibility of the States to suit before *federal tribunals*." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 240 n.2 (1985) (emphasis in original) (quoting *Employees v. Missouri Dep't of Public Health and Welfare*, 411 U.S. 279, 293-94 (1973) (Marshall, J., concurring in result)). Thus, wherever the Eleventh Amendment has been found to preclude federal court jurisdiction, some other forum has been available. See, e.g., *Atascadero*, 473 U.S. at 240 n.2 ("It denigrates the judges who serve on the State courts to suggest that they will not enforce the supreme law of the land"); *Pennhurst State School and Hosp. v. Halderman*, 465 U.S. 89, 121-23 (1984) (requiring pendent state law claims to be brought in state court); *Welch v. State Dep't of Highways*, 107 S.Ct. 2941, 2953 n.19 (1987) (worker's compensation claim could be pursued in state court).

In these previously decided Eleventh Amendment cases, plaintiffs could have sought relief in state courts. There is, however, an important class of potential plaintiffs for whom a holding that Congress could not, under its Article I powers, abrogate Eleventh Amendment immunity, would be devastating. This class comprises the publishers represented by *amici*, as well as others—authors, artists, playwrights, filmmakers, composers, computer programmers, and more—of this country's creative community. As copyright owners, they may seek judicial relief *only* in federal courts, where exclusive

jurisdiction over infringement actions lies.¹ AAP and AAUP members, for example, do substantial business with state entities.² Indeed, some specialized publishers may do the majority of their business with entities having potential Eleventh Amendment immunity. If the Eleventh Amendment closes the federal courthouse door to them, then states would be free to ignore the carefully crafted balance created by the copyright law, 17 U.S.C. §§ 101 *et seq.*³

Until relatively recently, very few copyright cases had involved Eleventh Amendment issues. The only two cases concerning the Copyright Act of 1909 were split on the question of immunity. In *Wihtol v. Crow*, 309 F.2d 777 (8th Cir. 1962), the court held a school system immune from liability for a teacher's infringing duplication of a musical work, while in *Mills Music, Inc. v. Arizona*, 591 F.2d 1278 (9th Cir. 1979), the

¹ 28 U.S.C. § 1338(a) (1982). The Copyright Act, by preempting state laws that might otherwise cover copyright infringing activities, 17 U.S.C. § 301 (1982), precludes any possibility that copyright owners might seek relief from state entities on state law grounds in state courts. Cf. *Welch*, 107 S.Ct. 2941, where a state law remedy was potentially available.

² AAP estimates that, in 1986, U.S. book publishers sold \$1.1 billion worth of college and university textbooks to customers with potential Eleventh Amendment immunity who might well not be liable for damages should they choose to copy rather than purchase such materials. See generally, *Register of Copyrights, Copyright Liability of States and the Eleventh Amendment* 5-17 (1988).

³ While under Eleventh Amendment doctrine some manner of injunctive relief may be available, Congress could not have considered injunctions alone to be an adequate remedy for copyright infringement. By their nature, injunctions can merely "forestall future violations." *United States v. Oregon State Medical Society*, 343 U.S. 326, 333 (1952). Injunctions, unlike damages, do not provide any degree of recompense to aggrieved copyright owners for infringements that have already occurred, or for markets that have been substantially eroded, if not destroyed. Nor are they available without a likelihood of repeated harm by the infringing party. A limitation to injunctive relief would eliminate any real possibility of favorable settlement for copyright owners and would permit the continuation of infringing activity by great numbers of entities, until in each separate case the particular infringement happens to be detected and an injunction obtained. Moreover, it should be noted that copyright infringement, for example, of computer software, or by photocopying, is particularly unsuceptible to detection as compared to most wrongs traditionally remedied by injunctive relief. Injunctive relief is thus likely to be even less effective in forestalling serious harm than usual.

court held a state liable for the unauthorized public performance of music.

In the last several years, however, additional courts have accorded Eleventh Amendment immunity in copyright cases.⁴ And at least one of these courts has suggested that not only has Congress not acted to abrogate state immunity, but that Congress has no power to do so, notwithstanding the plenary congressional copyright power under Article I.⁵

AAP and AAUP have, together with other copyright owners, filed briefs *amici curiae* in the Courts of Appeals for the Fourth and Ninth Circuits,⁶ urging that Congress, in enacting the copyright law, met the "unmistakable clarity" standard set out in *Atascadero*, 473 U.S. at 242, and *Welch*, 107 S. Ct. at 2948, if, indeed, that standard is applicable in copyright cases. *Amici* have argued, and necessarily, that Congress has the power, under Article I of the Constitution, to abrogate Eleventh Amendment immunity. This court has suggested that such power exists, and, as set out below, several courts of appeals have expressly reached this conclusion.

One of the "certain exceptions to the reach of the Eleventh Amendment," *Welch*, 107 S. Ct. at 2945, arises when Congress, pursuant to its plenary power, provides for a cause of action in federal court against the States:

Because of the Eleventh Amendment, States may not be sued in federal court unless they consent to it in

⁴ *Cardinal Indus. v. Anderson Parrish*, No. 83-1083-Civ-T-13 (M.D. Fla. Sept. 6, 1985), *aff'd* 811 F.2d 609 (11th Cir.), *cert. denied*, 108 S.Ct. 88 (1987); *BV Engineering v. UCLA*, 657 F.Supp. 1246 (C.D. Cal. 1987); *Richard Anderson Photography v. Radford Univ.*, 633 F.Supp. 1154 (W.D. Va. 1986); *Woelffer v. Happy States of America, Inc.*, 626 F.Supp. 499 (N.D. Ill. 1985); and *Mihalek Corp. v. Michigan*, 595 F.Supp. 903 (E.D. Mich. 1984), *aff'd on other grounds*, 814 F.2d 290 (6th Cir.), *cert. denied* 108 S.Ct. 503 (1987). *Contra, Johnson v. University of Va.*, 606 F.Supp. 321 (W.D. Va. 1985).

⁵ See, *Richard Anderson Photography*, 633 F.Supp. 1154 (W.D. Va. 1986).

⁶ *Richard Anderson Photography v. Radford Univ.*, 633 F.Supp. 1154 (W.D. Va. 1986), *appeal docketed*, No. 87-1610 (4th Cir. 1987); *BV Engineering v. UCLA*, 657 F.Supp. 1246 (C.D. Cal. 1987), *appeal docketed*, No. 87-5920 (9th Cir. 1987).

unequivocal terms or unless Congress, *pursuant to a valid exercise of power*, unequivocally expresses its intent to abrogate the immunity.

Green v. Mansour, 474 U.S. 64, 68 (1985) (emphasis added). The Copyright Act was enacted pursuant to a direct constitutional grant of power, the Copyright and Patent Clause, Art I, § 8, cl. 8. That constitutional source fully empowers Congress to abrogate the states' Eleventh Amendment immunity with respect to copyright, and to subject state entities—in common with all other alleged copyright infringers—to damage suits in federal court.

There is no basis to doubt that Congress can rely on any of its powers (including those in Article I) to subject states to suit in federal court on federal causes of action. In *Green v. Mansour*, this Court did not limit congressional power to the Fourteenth Amendment, but broadly declared that Congress may abrogate state immunity "pursuant to a valid exercise of power." *Id.* In two other cases, this Court has assumed, without expressly deciding, that Congress may abrogate state immunity under Article I. *Welch*, 107 S.Ct. at 2946; *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 252-53 (1985).

No persuasive rationale exists to support congressional power to abrogate state immunity when it acts under Section 5 of the Fourteenth Amendment—a power expressly recognized in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976)—but not when it acts under its other plenary powers. In *Welch*, the Court set forth persuasive reasoning for concluding that Congress does have authority to abrogate a state's immunity to suit in federal court under its Article I powers:

By ratifying the Constitution, the argument runs, the States necessarily consented to suit in federal court with respect to enactments under [a Constitutional Clause authorizing Congressional regulation].

107 S.Ct. at 2947 n.5.

This rationale has been adopted by the court below and by other courts of appeals considering the issue, which have concluded that there is no constitutionally significant way to

distinguish Congress' Fourteenth Amendment power from any of its Article I powers. See *In re McVey Trucking, Inc.*, 812 F.2d 311, 314-23 (7th Cir.), cert. denied, 108 S.Ct. 227 (1987) (discussing *Atascadero* and its predecessors, and concluding, after extensive analysis, that the various Congressional plenary powers cannot be distinguished); *In re Vazquez, Guerrero and Compton*, 788 F.2d 130, 132 (3d Cir.), cert. denied, 107 S.Ct. 414 (1986) (abrogation of Eleventh Amendment immunity under Bankruptcy Clause); *Mills Music, Inc. v. Arizona*, 591 F.2d 1278, 1285 (9th Cir. 1979) ("[T]he Copyright and Patent Clause is a specific grant of constitutional power that contains inherent limitations on state sovereignty. . . . [I]t is clear that the abrogation of a state's Eleventh Amendment immunity is inherent in the Copyright and Patent Clause and the Copyright Act"); *Peel v. Florida Dep't of Transp.*, 600 F.2d 1070, 1080-81 (5th Cir. 1979) (Congress may abrogate state immunity in an act passed pursuant to the war powers in Art. I, § 8). Of like effect, although not concerned with Article I, is *County of Monroe v. Florida*, 678 F.2d 1124, 1132 n.8, 1133 (2d Cir. 1982), cert. denied, 459 U.S. 1104 (1983) (Congress may, pursuant to Art. IV, § 2, cl. 2, abrogate state immunity from suit on extradition-related claims).

Recognition of Congress' power to abrogate Eleventh Amendment immunity under Article I is particularly essential if the statutory balance between copyright owners and users of their works is to be maintained. Recent copyright litigation and other claims of Eleventh Amendment immunity in the copyright context⁷ reflect assertions that states are substantially beyond the reach of the copyright law. A decision holding Congress unable to abrogate state immunity under its Article I powers could affect not only the whole panoply of commerce clause issues but also the property rights of *amici* and all copyright owners.

⁷ In a recent congressionally requested inquiry, the Copyright Office of the Library of Congress noted that, in addition to the five states asserting Eleventh Amendment copyright immunity in the cases cited in n.4, *supra* (Virginia, California, Florida, Michigan and Illinois), North Carolina, Wisconsin, Massachusetts, Minnesota, and Texas have asserted their immunity in other contexts. *Register of Copyrights, Copyright Liability of States and the Eleventh Amendment* 8, 9, app. C at CRS-21 (1988).

CONCLUSION

For the foregoing reasons, the decision of the court of appeals holding that Congress may abrogate Eleventh Amendment immunity under its Article I powers should be affirmed.

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Respectfully submitted,

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On Writ of Certiorari to the United States
Court of Appeals for the Third Circuit

**BRIEF FOR THE AMERICAN FEDERATION OF LABOR
AND CONGRESS OF INDUSTRIAL ORGANIZATIONS
AS *AMICUS CURIAE* SUPPORTING RESPONDENT**

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**BRIEF OF THE
AMERICAN FEDERATION OF LABOR AND CONGRESS
OF INDUSTRIAL ORGANIZATIONS
AS *AMICUS CURIAE* SUPPORTING RESPONDENT**

This brief *amicus curiae* is filed with the consent of the parties, as provided for in the Rules of the Court.

INTEREST OF THE *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations is a federation of 90 national and international unions with a total membership of roughly 13,000,000 working men and women, a significant proportion of whom are employed by state governments and have an interest in proper interpretation of the Eleventh Amendment.

ARGUMENT

Introduction and Summary

Respondent Union Gas has brought suit—in the form of a third-party complaint—against the State of Pennsylvania for monetary damages. The suit is based on a federal statute duly enacted pursuant to the commerce power.¹ The statute expressly provides that, under the circumstances asserted in the complaint here, states may be subject to such suits.² The question presented is whether respondent's suit is barred by the Eleventh Amendment.

We believe resolution of this question should begin, and end, with inquiry into whether the Eleventh Amendment applies at all to suits, like the instant one, that are brought to enforce *federal substantive rights*. As we read the text, and the pertinent historical materials, the Eleventh Amendment was intended to apply only to cases

¹ Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA" or the "Superfund Act"), 42 U.S.C. §§ 9601 *et seq.* (1982) (as amended by Superfund Amendments & Re-authorization Act of 1986, Pub. L. No. 99-499).

² 42 U.S.C. § 9601(20)(D).

in which state law supplies the substantive law—diversity cases—and not to federal question cases.

We are aware that since *Hans v. Louisiana*, 134 U.S. 1 (1890), this Court has adopted a contrary view on this point, holding that the Eleventh Amendment applies equally to federal question and diversity actions. In *Welch v. State Dept. of Highways and Public Transp.*, — U.S. —, 107 S.Ct. 2941 (1987), however, this Court was evenly divided on the question whether the *Hans* doctrine should be overruled. The *Hans* doctrine has profound consequences for the nature of our federal system. A large and growing body of scholarship supports the view that *Hans* was incorrectly decided.³ And, respondents in this case have squarely placed the continuing vitality of *Hans* before the Court. This case thus provides an appropriate occasion for resolving the matter in a definitive fashion by overruling *Hans*.

The federal system created by our Constitution is based on bifurcated sovereignties. The states are sovereign with respect to all matters reserved to them, but the states are not sovereign where the action of the federal government constitutes “the supreme Law of the Land.” U.S. Const., Art. VI, cl. 2. As Chief Justice Marshall put it in *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 410 (1819):

In America, the powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other.

With respect to the exercise of powers given to the federal government in the Commerce Clause of Article I, the federal government, not the states, is sovereign. *E.g.*, *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 197-200, 210-211 (1824). In passing the Superfund Act, Congress

³ See the authorities cited by Justice Brennan in his dissenting opinion in *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 258 n.11 (1985). See also *Welch*, 107 S.Ct. at 2965 n.16, 2967 n.17. (Justice Brennan, dissenting).

legislated within that realm of federal sovereignty. The Superfund Act is therefore “the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. Const., Art. VI, cl. 2. Application of that Act to the states by definition does not infringe upon the sovereignty of the states, because the states are not sovereign with respect to matters dealt with by the Act. For that reason, the doctrine of sovereign immunity, in its classical formulation, is not implicated by a suit in federal court against a state on a Superfund Act claim. In the words of Justice Holmes:

Some doubts have been expressed as to the source of the immunity of a sovereign power from suit without its own permission, but the answer has been public property since before the days of Hobbes. *Leviathan*, chap. 26, 2. A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends. [*Kawanakoa v. Polyblank*, 205 U.S. 349, 353 (1907).]

It is our submission that the Eleventh Amendment was adopted to implement this concept of sovereign immunity in the unique context created by the Constitution’s provision of federal judicial power not only over cases arising under the Constitution, statutes and treaties of the United States—as to which the federal government is sovereign and the states are not—but also over diversity cases where the substantive rights in litigation are based upon state, not federal, law. In diversity cases, the states are entitled to sovereign immunity under the classical formulation of that concept as described by Justice Holmes. As we show in this brief, the Eleventh Amendment was intended to apply only to diversity cases and not to federal question cases.

In part I of this brief, we show that the words of the Eleventh Amendment, read together with Article III

of the Constitution, cannot be reconciled with the proposition that the Eleventh Amendment was meant to apply to federal question cases. The words of the Eleventh Amendment do *not* mention suits by citizens against their own state. This omission was not, as this Court has previously assumed, inadvertent. Under the federal judicial power defined in Article III, section 2, a citizen could not bring a diversity action against his own state, but could only sue his state on federal question or admiralty grounds. The words that Congress chose for use in the Eleventh Amendment to restrict federal jurisdiction—excluding from the federal courts suits brought against a state “by citizens of another state, or by citizens or subjects of any foreign state”—were precisely and only the words that had been used in Article III, section 2, to define those categories of federal *diversity* jurisdiction in which states could be sued by private parties. The words of Article III, section 2, that had extended the federal judicial power to federal question cases—which could be brought against any party, including states—were not used or referred to in the Eleventh Amendment. Thus, the natural reading of the Eleventh Amendment is that the Amendment applies only to diversity cases. Had the framers of the Eleventh Amendment intended to bar all suits brought in federal court by private parties against states—including federal question cases—they had only to say so. If that had been their intent, the framers would have had no reason to select out, as they did, only suits against states “by citizens of another state, or by citizens or subjects of any foreign state.”

In part II, we show that the conclusion that the Eleventh Amendment was not meant to apply in federal question cases is reinforced when consideration is given to the background of the amendment. The immediate impetus for adoption of the Eleventh Amendment was this Court’s decision in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). *Chisholm* was a *diversity* case brought in federal court upon a state law cause of action against

a state by a citizen of another state. The dissent of Justice Iredell in *Chisholm* is regarded as embodying the substantive rationale of the Eleventh Amendment. We analyze that dissent in detail and show that the logic of Justice Iredell’s analysis supporting the applicability of state sovereign immunity is limited to the context of the federal diversity jurisdiction, and that the concepts of sovereignty urged by Justice Iredell support the notion that states should *not* be immune from suit in federal court in federal question cases.

We further show in part II that in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 412 (1821), Chief Justice Marshall in an opinion for the Court ruled (in an alternative holding) that the Eleventh Amendment does *not* apply in a federal question case in federal court by a citizen against his own state. Chief Justice Marshall also had occasion in *Cohens* to set forth the understanding of the framers of the Constitution on the applicability of state sovereign immunity in federal question cases in the federal courts. Chief Justice Marshall concluded that “a case arising under the constitution or laws of the United States, is cognizable in the courts of the Union, whoever may be the parties to that case.” *Id.* at 383.

Nearly 70 years after *Cohens* and nearly 100 years after adoption of the Eleventh Amendment, this Court in *Hans v. Louisiana*, 134 U.S. (1890), ruled that the Eleventh Amendment immunizes states from federal question suits in federal courts. In part III, we show that *Hans* is in error. *Hans* was based on a misreading of Justice Iredell’s opinion in *Chisholm*, as well as on a misreading of Federalist No. 81 and other sources contemporary to the adoption of the Constitution, and on a disregard for the words of Chief Justice Marshall in *Cohens*. Indeed, *Hans* was based on a disregard for the words of the Eleventh Amendment.

We further show in part III that the effect of *Hans* is continuing and profound, and that the error of that decision cannot be considered to have outlived the period

in which it profitably might be corrected. This is true in two fundamental respects.

First, to grant that states have an immunity from suits brought on matters as to which the federal government is sovereign is correspondingly to diminish the powers given to the federal government. An enhancement of the sovereignty of the states means a corresponding lessening of the sovereignty of the national government. If, as we submit, such enhancement was not intended by the Constitution, *Hans* improperly alters the constitutional scheme.

Second, in order to mitigate the infringement upon proper federal powers that otherwise would result from *Hans*, this Court's Eleventh Amendment decisional law is filled with rules which are difficult to understand in light of the premises of the doctrine and under which the existence of federal authority often turns on whether a variety of empty formalisms are observed. That the sensitive balance between state and federal power has come to depend on *ad hoc* adjustments to the rigor of the *Hans* rule is reason enough to reconsider that rule.

Finally, in part IV of this brief, we show that, under established principles of *stare decisis*, it is appropriate to overrule the decision in *Hans*. And—while the issue is of great moment in terms of the integrity of our constitutional scheme—as a practical matter, such a decision would cause little, if any, disruption to settled expectations as to the application of existing statutes.

I. THE TEXT OF THE ELEVENTH AMENDMENT

The point of departure for analysis of the meaning of a provision of the Constitution is the language of that provision, which after all is what was duly agreed upon and adopted as law. Thus, the words of the provision, read together with the other provisions of the Constitution so as to make sense of the document as a whole, provide the surest guide to the provision's meaning. Yet beginning with *Hans v. Louisiana*, 134 U.S. 1 (1890), the Eleventh Amendment has been interpreted in a man-

ner which, as *Hans* itself acknowledges (*id.* at 15), cannot be squared with the constitutional text.⁴

The Eleventh Amendment provides as follows:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

By its terms, the Eleventh Amendment does not deny the federal courts jurisdiction over suits by citizens against their own state. In holding such suits to be outside the jurisdiction of the federal courts, *Hans* thus read into the Eleventh Amendment a limitation of federal judicial power nowhere contained in the words of the Eleventh Amendment, and gave that Amendment a meaning not even remotely suggested by its text.

The *Hans* Court thought it necessary to thus rewrite the Eleventh Amendment in order to make sense out of the provision. Proceeding from the premise that the Eleventh Amendment “indignantly repelled” all suits against a state by citizens of another state, even where founded upon a federal question, the Court reasoned that, having precluded such suits, it “is almost an absurdity on its face” to allow citizens to bring federal question suits against their own state. 134 U.S. at 15. But the premise that led the Court in *Hans* to rewrite the Eleventh Amendment—that the Amendment bars federal question cases against a state where diversity of citizenship also happens to exist—is an unsound reading of the constitutional text: although the words of the Eleventh Amendment, if taken in isolation, could bear that interpretation, such a construction fails to take into account other provisions of the Constitution that point to a more nat-

⁴ See also, e.g., *Atascadero State Hosp.*, *supra*, 473 U.S. at 238:

Thus, in *Hans v. Louisiana* [citation omitted], the Court held that the Amendment barred a citizen from bringing a suit against his own State in federal court, even though the express terms of the Amendment do not so provide.

ural meaning that does not require the Amendment to be judicially rewritten.

Specifically, we refer to Article III, section 2, of the Constitution, the provision that defines the “Judicial power of the United States.” The Eleventh Amendment expressly is addressed to the scope of that power; the Amendment is, in essence, an amendment of Article III; and, as we will show, the critical words of the Amendment are imported directly from Article III. It is thus essential to look to Article III to illuminate the meaning of the words of the Eleventh Amendment.

Article III, section 2, defines the judicial power of the federal courts by listing the categories of cases to which that power extends.⁵ The categories of cases listed are in turn defined by their subject matter or by their parties. Thus, the federal judicial power extends to all federal question cases (“all cases . . . arising under this constitution, the laws of the United States, and treaties made”) regardless of the identity of the parties to the case. And, by the same token, the federal judicial power extends to diversity cases (including “Controversies . . . between a State and Citizens of another State; . . . and between a State and foreign States, Citizens or Subjects”) regardless of the subject matter of the case.

Thus, under the language of Article III, section 2, taken by itself, there are two types of cases in which

⁵ Article III, section 2, provides in pertinent part as follows:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

a state could be sued in federal court by an individual: A state could be sued in federal court when the *subject matter* of the suit is one specified in that provision—for our purposes, when the suit is a federal question case; or a state could be sued in federal court based on the *identity of the parties*, e.g., when the plaintiff is a citizen of another state or a citizen or subject of a foreign state.

The words used in the Eleventh Amendment to define the category of cases to which the judicial power “shall not . . . extend”—suits brought against states prosecuted “by Citizens of another State, or by Citizens or Subjects of any Foreign State”—are precisely and only the words used in Article III, section 2, to create that part of the *diversity or party* jurisdiction in which states could be sued by private parties.⁶ By contrast, the Eleventh Amendment does not use or refer to the words of the Article III, section 2, that extend the federal judicial power to federal question cases.

In this context, the most natural interpretation of the Eleventh Amendment is that the federal courts’ *diversity or party* jurisdiction shall not extend to suits against states by private parties. Once it is recognized that the words of the Eleventh Amendment are the words used in Article III, section 2, solely to create party jurisdiction, the logic of the Eleventh Amendment is apparent: that Amendment excludes from the federal judicial power diversity cases by private parties against states, but *not* federal question cases. The natural inference is that those words were used in the Eleventh Amendment in the same sense as in Article III, section 2, and were not

⁶ Article III, section 2, also provides that the federal judicial power extends to cases against states brought by the federal government, another state, or a foreign state. The Eleventh Amendment has been held not to bar a suit by the United States against a state, or by a state against another state, but to immunize states from suits by foreign states. See *Monroe v. Mississippi*, 292 U.S. 313 (1934); *South Dakota v. North Carolina*, 192 U.S. 286 (1904); *United States v. Texas*, 143 U.S. 621 (1892).

intended to take on a new and more sweeping meaning. Had the framers of the Eleventh Amendment intended to bar all suits brought in federal courts by private parties against states—including federal question cases—they had only to say so. In that event, they would have had no reason to select out, as they did, only suits against states “by Citizens of another State, or by Citizens or Subjects of any Foreign State.”

II. THE ORIGINAL UNDERSTANDING OF THE ELEVENTH AMENDMENT

The conclusion reached by analyzing the constitutional text—that the Eleventh Amendment applies only to diversity cases brought by private parties against states based on state law—is reinforced by consideration of the background of the Eleventh Amendment.

A. The immediate impetus for adoption of the Eleventh Amendment was this Court’s decision in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). *Chisholm* was a diversity case brought in federal court upon a state law cause of action—*assumpsit*—against a state by a citizen of another state. *Chisholm* sought to collect a debt allegedly owed by Georgia. By a four to one majority, the *Chisholm* Court ruled that the case could indeed be maintained in a federal court. That ruling was “displaced” with “vehement speed” by the Eleventh Amendment. *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682, 708 (1949) (Frankfurter, J., dissenting); *see also Hans v. Louisiana, supra*, 134 U.S. at 12.

The dissent of Justice Iredell in *Chisholm* is regarded as embodying the substantive rationale of the Eleventh Amendment. See Fletcher, *A Historical Interpretation of the Eleventh Amendment*, 35 Stanford L. Rev. 1033, 1077 (1983) (hereinafter “Fletcher”); Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. Pa. L. Rev. 515, 541 (1978). As the *Hans* Court put it, in light of the Eleventh Amendment there is an “additional interest [in] the able opinion of Mr. Justice Iredell on that occasion.” 134 U.S.

at 12 (emphasis in original). Properly understood, the concepts of sovereignty urged by Justice Iredell support the notion that states should *not* be immune from suit in federal court in federal question cases.

In his dissent, Justice Iredell focused on whether by entering into the Union and by agreeing to the Constitution the states had given up their sovereign immunity with respect to suits brought in the federal courts. Justice Iredell understood that the considerations governing this question differ depending on whether a case is a federal question case or a diversity case. Thus, Justice Iredell recognized that the states had “delegated” part of their sovereignty to the United States and, accordingly, that the sovereignty of the states was only in the areas that had not been delegated:

Every state in the union in every instance where its sovereignty has not been delegated to the United States, I consider to be as completely sovereign, as the United States are in respect to the powers surrendered. The United States are sovereign as to all the powers of government actually surrendered. Each state in the union is sovereign as to all the powers reserved. It must necessarily be so, because the United States have no claim to any authority but such as the states have surrendered to them. Of course the part not surrendered must remain as it did before. [2 U.S. at 435.]

With respect to the legislative and executive branches of the federal government, Justice Iredell believed, this bifurcation of sovereignties posed no particular problem:

The powers of the general government, either of a legislative or executive nature, or which particularly concern treaties with foreign powers, do for the most part (if not wholly) affect individuals, and not states. They require no aid from any state authority. This is the great leading distinction between the old articles of confederation, and the present constitution. [Id.]

But, as Justice Iredell put it, “[t]he judicial power is of a peculiar kind.” *Id.* The peculiarity, in his view,

stemmed from the fact that the judicial power extends to two quite different categories of cases. The first category—like the executive and legislative power of the federal government—simply involves the judiciary in matters wholly encompassed by the federal sovereignty. In this category of cases, the federal judicial power “is indeed commensurate with the ordinary legislative and executive powers of the general government, and the power which concerns treaties.” *Id.* This “part of the judicial power . . . relate[s] to the execution of the other authorities of the general government (which it must be admitted are full and discretionary, within the restrictions of the constitution itself). . . .” *Id.* at 432. In present terminology, this “part of the [federal] judicial power” is the power to decide federal question cases.

It is at least implicit in Justice Iredell’s discussion of the power of federal courts to decide federal questions that such power could not implicate any question of state sovereign immunity. By his analysis, the states had no sovereignty as to federal questions. “But,” in Justice Iredell’s words, the federal judicial power “also goes further.” *Id.* at 435. And, it was in this “further” extension of the federal judicial power that Justice Iredell found the sovereign immunity of the states to be implicated. For in exercising this part of the federal judicial power—the power to decide diversity cases—the judiciary was not operating as to subject matters within the realm of federal sovereignty but was instead merely providing a neutral forum for the resolution of issues as to which the states had not given up their sovereignty. Indeed, the source of the legal rights to be resolved in such cases was state law, as to which the states by definition were sovereign.⁷

⁷ It is apparent from the face of his opinion that Justice Iredell assumed, contrary to what the Court later erroneously held in *Swift v. Tyson*, 41 U.S. 1 (16 Pet.) (1842), that state law, not general federal common law, is the source of substantive law in diversity actions. 2 U.S. at 435-437. See Amar, *Of Sovereignty*

The following excerpts from Justice Iredell’s opinion show that his concerns about state sovereignty were a consequence of these attributes of the diversity jurisdiction and have no application in federal question cases:

But [the federal judicial power] also goes further. Where certain *parties* are concerned, although the *subject* in controversy does not relate to any of the special objects of authority of the general government, wherein the separate sovereignties of the states are blended in one common mass of supremacy, yet the general government has a judicial au-

and *Federalism*, 96 Yale L.J. 1425, 1472 (1987) (one footnote omitted):

Iredell presaged *Erie Railroad Co. v. Tompkins*’ [304 U.S. 64 (1938)] repudiation of [the *Swift v. Tyson*] doctrine. The liability of the state in *assumpsit*, he argued, should be determined not by general federal common law, but by antecedent state law.¹⁹⁷ And under a state common law rule of unquestioned constitutionality, no *assumpsit* lay against Georgia. For Iredell, Georgia’s “sovereign” immunity was therefore exactly coextensive with her derivative “sovereign” lawmaking capacity: A state could use its lawmaking power to adopt rules immunizing itself from liability, as long as such immunity frustrated no higher-law restrictions on the state’s limited sovereignty.

¹⁹⁷ Since he read the relevant congressional statutes to incorporate state law, Iredell did not reach the question of congressional power to displace state law rules of decision in diversity-type controversies. On this count, the *Erie* Court went further when it suggested that the diversity and necessary and proper clauses standing alone did not empower Congress to enact a general federal statutory rule of decision or to authorize a general federal common law.

Iredell also diverged from *Erie* in his emphasis on state law at the time of the ratification of the Constitution and adoption of the Judiciary Act instead of at the time of the lawsuit. This freezing of state law more closely resembles the static conformity methodology of the federal Process Acts of 1789 and 1792 . . . than the dynamic conformity methodology required by *Erie* and the Rules of Decision Act. [Emphasis in original]

thority in regard to such subjects of controversy, and the legislature of the United States may pass all laws necessary to give such judicial authority its proper effect. So far as states under the constitution can be made legally liable to this authority, so far to be sure they are subordinate to the authority of the United States, and their individual sovereignty is in this respect limited. But it is limited no farther than the necessary execution of such authority requires. [Id. at 435-436 (emphasis added)]

* * *

It follows, therefore, unquestionably, I think, that looking at the [First Judiciary Act], which I consider is on this occasion the limit of our authority (whatever further might be constitutionally, enacted[]) we can exercise no authority in the present instance consistently with the clear intention of the act, but such as a proper state court would have been at least competent to exercise at the time the act was passed.

If therefore, no new remedy be provided (as plainly is the case[]) and consequently we have no other rule to govern us but the principles of the pre-existent [state] laws, which must remain in force till superceded by others, then it is incumbent upon us to enquire, whether previous to the adoption of the Constitution . . . an action of the nature like this before the court could have been maintained against one of the states in the Union upon the principles of the common law, which I have shown to be alone applicable. If it could, I think it is now maintainable here: If it could not, I think, as the law stands at present, it is not maintainable. . . . [Id. at 436-437.] *

⁸ Having dealt with the question presented to the Court, Justice Iredell ventured "to intimate my present opinion" on an issue he acknowledged was not before the Court:

So much however, has been said on the constitution, that it may not be improper to intimate that my present opinion is strongly against any construction of it, which will admit, under any circumstances, a compulsive suit against a state for the

Professor Amar summarized the essence of Justice Iredell's dissent:

Thus, Iredell carefully limited his discussion to pure diverse party cases against states, in which jurisdiction did not rest upon a substantive federal cause of action based on a congressional statute or the self-executing provisions of the Constitution. The particular question before the Court was for Iredell a narrow one: "[W]ill an action of *assumpsit* lie against a State? This particular question [must

recovery of money. I think every word in the constitution may have its full effect without involving this consequence, and that nothing but express words, or an insurmountable implication (neither of which I consider, can be found in this case) would authorize the deduction of so high a power. This opinion I hold, however, with all the reserve proper for one, which, according to my sentiments in this case, may be deemed in some measure extra-judicial. [2 U.S. at 449-450].

There is no reason to believe that the Framers and enactors of the Eleventh Amendment meant to incorporate these musings on a problem that had not to that point ever arisen. Rather, as the terms of the Amendment strongly suggest, the Amendment was addressed to the issue Justice Iredell believed was raised by *Chisholm*: whether in a diversity case, where the only federal role is the provision of a forum for the resolution of issues of state law, states may be deprived of their right to sovereign immunity.

Moreover, the context of these *dicta* suggests that Justice Iredell may have had in mind an issue other than the general power of the federal government to use its delegated authority to make laws subjecting the states to monetary liability. Instead, Justice Iredell may have been venturing an opinion on a narrower point that he alluded to at several places in his opinion: whether Congress has the power to prescribe the substantive law to be applied in diversity cases, and, in the particular instance of the *dicta* in question, whether Congress may, in the course of prescribing such laws for diversity cases, subject the states to monetary liability in suits brought by individuals. See *supra* at note 7. The likelihood that this narrower point is the one Justice Iredell was addressing is greatly strengthened by the fact that at the time of *Chisholm* the Judiciary Act provided *only for diversity jurisdiction*, and not federal question jurisdiction, in the inferior federal courts. Lower federal courts were not granted federal question jurisdiction until the Judiciary Act of 1875. Act of March 3, 1875, 18 Stat. 470.

be] . . . abstracted from the general one, viz. Whether a State can in any instance be sued?" Although no assumpsit suit lay against Georgia on principles of "general jurisprudence," Iredell conceded that a different result might obtain in a federal question case "relat[ing] to the execution of the . . . authorities of the general Government (which it must be admitted are full and discretionary, within the restrictions of the Constitution itself)." In such cases, state "sovereignty has . . . been . . . delegated to the United States . . . wherein the separate sovereignties of the States are blended in one common mass of supremacy." [96 Yale L.J. at 1472-1473 (footnotes omitted).]

The Eleventh Amendment, then, was adopted in reaction to this Court's decision in a diversity case and on the heels of Justice Iredell's dissenting opinion which gave a justification for recognition of state sovereign immunity *only* in diversity cases. It is not surprising therefore that, as we have shown, the text of the Eleventh Amendment is directed only at diversity cases.

While the text of the Amendment, together with its immediate background, should be dispositive, it is worth noting that Justice Iredell's analysis in fact correctly reflected the views of those who enacted and ratified the Constitution. Those materials are exhaustively canvassed in Justice Brennan's dissenting opinion in *Atascadero State Hosp.*, *supra*, 473 U.S. at 259-290.⁹ Suffice it to say here that, as those materials show, invariably the issue of state sovereign immunity arose in the context of the diversity jurisdiction clauses of Article III, section 2. That the states would, or at least might, have no immunity from suit in federal courts on federal questions seems not to have been a matter of concern to those who adopted the Constitution.

⁹ Justice Brennan's dissenting opinion in *Atascadero State Hosp.*, 473 U.S. at 284-290, also describes in detail the legislative history of the Eleventh Amendment itself, which history, while not particularly illuminating, is wholly consistent with the interpretation pressed in this brief.

B. Nearly 70 years before the decision in *Hans*, Chief Justice Marshall had occasion to address the meaning of the Eleventh Amendment in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821). In that case, this Court sustained its power to entertain a writ of error to a state court on a federal question in a case where the state was a party, having sought to prosecute one of its own citizens. After first concluding that a writ of error is not a "suit" under the Eleventh Amendment, Chief Justice Marshall, writing for the Court, stated an alternative holding:

But should we in this be mistaken, the error does not affect the case now before the court. If this writ of error be a suit in the sense of the 11th amendment, it is not a suit commenced or prosecuted "by a citizen of another state, or by a citizen or subject of any foreign state." It is not, then, within the amendment, but is governed entirely by the constitution as originally framed, and we have already seen, that in its origin, the judicial power was extended to all cases arising under the constitution or laws of the United States, without respect to parties. [*Id.* at 412.]

The discussion referred to in the above passage respecting "the constitution as originally framed" is as important as this alternative holding, because that discussion sets forth the understanding of Chief Justice Marshall and the *Cohens* Court on the applicability of state sovereign immunity in federal question cases in the federal courts under the Constitution as originally drafted. In that part of the opinion, Chief Justice Marshall began by making clear that when a sovereign entity has agreed to yield a portion of its sovereignty, that entity must be understood to have given up as well the immunity from suit that is incidental to the yielded sovereignty:

The Counsel for the [state] . . . have laid down the general proposition, that a sovereign independent state is not suable except by its own consent.

This general proposition will not be controverted. But its consent is not requisite in each particular

case. It may be given in a general law. And if a state has surrendered any portion of its sovereignty, the question whether a liability to suit be a part of this portion, depends on the instrument by which the surrender is made. If, upon a just construction of that instrument, it shall appear that the state has submitted to be sued, then it has parted with this sovereign right of judging in every case on the justice of its own pretensions, and has entrusted that power to a tribunal in whose impartiality it confides. [*Id.* at 380.]

The Chief Justice then went on to find that in joining the Union and agreeing to the Constitution, the states had indeed given up a significant measure of their sovereignty. In particular, he pointed to the Supremacy Clause as the manifestation of that transfer:

The American States, as well as the American people, have believed a close and firm Union to be essential to their liberty and to their happiness. They have been taught by experience, that this Union cannot exist without a government for the whole; and they have been taught by the same experience that this government would be a mere shadow, that must disappoint all their hopes, unless invested with large portions of that sovereignty which belongs to independent states. Under the influence of this opinion, and thus instructed by experience, the American people, in the conventions of their respective states, adopted the present constitution.

If it could be doubted, whether from its nature, it were not supreme in all cases, where it is empowered to act, that doubt would be removed by the declaration, that "this constitution, and the laws of the United States, which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby; anything in the constitution or laws of any state to the contrary notwithstanding."

This is the authoritative language of the American people; and, if gentlemen please, of the Ameri-

can States. It marks, with lines too strong to be mistaken, the characteristic distinction between the government of the Union and those of the states. The general government, though limited as to its objects, is supreme with respect to those objects. This principle is a part of the constitution; and if there be any who deny its necessity, none can deny its authority. [*Id.* at 380-381.]

On the premises thus established, Chief Justice Marshall concluded that the states had given up their sovereign immunity as to matters now within the sovereignty of the United States:

With the ample powers confided to this supreme government . . . are connected many express and important limitations on the sovereignty of the states, which are made for the same purposes. The powers of the Union, on the great subjects of war, peace, and commerce, and on many others, are in themselves limitations of the sovereignty of the states; but in addition to these, the sovereignty of the states is surrendered in many instances where the surrender can only operate to the benefit of the people, and where, perhaps, no other power is conferred on Congress than a conservative power to maintain the principles established in the constitution. The maintenance of these principles in their purity, is certainly among the great duties of the government. One of the instruments by which this duty may be peaceably performed, is the judicial department. It is authorized to decide all cases of every description, arising under the constitution or laws of the United States. From this general grant of jurisdiction, no exception is made of those cases in which a state may be a party. When we consider the situation of the government of the Union and of a state, in relation to each other; the nature of our Constitution; the subordination of the state governments to that constitution; the great purpose for which jurisdiction over all cases arising under the constitution and laws of the United States is confided to the judicial department, are we at liberty to insert in this general grant, an exception of those

cases in which a state may be a party? Will the spirit of the constitution justify this attempt to control its words? We think it will not. *We think a case arising under the constitution or laws of the United States, is cognizable in the courts of the Union, whoever may be the parties to that case.* [Id. at 382-383 (emphasis added.)]

III. THE ERROR OF HANS

A. In the face of these authorities, in 1890—nearly seventy years after *Cohens* and almost one hundred years after the Eleventh Amendment was adopted—the *Hans* Court ruled that the Amendment immunizes states from federal question suits brought by private parties in the federal courts. In reaching this result, the *Hans* Court relied primarily on Justice Iredell's dissent in *Chisholm* and on other materials addressed to the question of state sovereign immunity in *diversity* cases. It is clear from the face of the opinion that the Court in *Hans* misunderstood the purport of these materials.

Thus, in discussing the dissent by Justice Iredell, the *Hans* Court acknowledged that the controversy in *Chisholm* centered on the application of state sovereign immunity in *diversity* cases, but then ignored that limitation in drawing its conclusion:

The other justices were more swayed by a close observance of the letter of the Constitution, without regard to former experience and usage; and because the letter said that the judicial power shall extend to controversies "between a State and citizens of another State;" and "between a State and foreign states, citizens or subjects," they felt constrained to see in this language a power to enable the individual citizens of one State, or of a foreign state, to sue another State of the Union in the federal courts. *Justice Iredell*, on the contrary, contended that it was not the intention to create new and unheard of remedies, by subjecting sovereign States to actions at the suit of individuals (which he conclusively showed was never done before), but only, by proper legislation, to invest the federal courts

with jurisdiction to hear and determine controversies and cases between the parties designated, that were properly susceptible of litigation in courts. [134 U.S. at 12.]

The *Hans* Court similarly mistook the point of a passage from Federalist No. 81, authored by Alexander Hamilton, on which the *Hans* Court heavily relied. Hamilton wrote:

It has been suggested that an assignment of the public securities of one State to the citizens of another would enable them to prosecute that State in the federal courts from the amount of those securities; a suggestion which the following considerations prove to be without foundation.

It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States and the danger intimated must be merely ideal. The circumstances which are necessary to produce an alienation of State sovereignty were discussed in considering the article of taxation and need not be repeated here.^[16] A recurrence to the principles there established will satisfy us that there is no color to pretend that the State governments would, by the adoption of that plan, be divested of

^[16] This reference is to Federalist No. 32, in which Hamilton stated three circumstances which "produce an alienation of State sovereignty":

where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union, and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union to which a similar authority in the States would be absolutely and totally *contradictory and repugnant*. [Federalist No. 32 (Hamilton), *The Federalist* (Modern Library Ed.), at 198 (emphasis in original).]

the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action independent of the sovereign will. [Federalist No. 81 (Hamilton), *The Federalist* (Modern Library Ed.), at 529-530 (emphasis removed).]

As is apparent from Hamilton's description of the issue being addressed—"that an assignment of the public securities of one State to the citizens of another would enable them to prosecute that State in the federal courts for the amount of those securities"—the cause for concern was the diversity jurisdiction, not the federal question jurisdiction. Indeed, implicit in Hamilton's discussion of this issue is that states could be sued in federal courts on federal questions. Thus, Hamilton linked the ability of the states to claim sovereign immunity only to those matters as to which the states would retain their sovereignty. Immunity from suit was "in the nature of sovereignty" and accordingly except as to those matters upon which the Constitution "produce[d] an alienation of State sovereignty" the states would remain immune. By implication, as to those matters upon which the Constitution effected an "alienation of State sovereignty," the states would not be immune.

The *Hans* Court recognized that Federalist No. 81 was addressed to a problem created by the diversity clause, but erroneously assumed without analysis that the same reasoning applied in federal question cases as well:

The obnoxious clause to which Hamilton's argument was directed, and which was the ground of the objections which he so forcibly met, was that which declared that "the judicial power shall extend to all . . . controversies between a State and citizens of another State, . . . and between a State and foreign states, citizens or subjects." It was argued by the opponents of the Constitution that this clause would authorize jurisdiction to be given to the federal

courts to entertain suits against a State brought by the citizens of another State, or of a foreign state. Adhering to the mere letter, it might be so; and so, in fact, the supreme court held in *Chisholm v. Georgia*; but looking at the subject as Hamilton did, and as Mr. Justice Iredell did, in the light of history and experience and the established order of things, the views of the latter were clearly right,—as the people of the United States in their sovereign capacity subsequently decided. [134 U.S. at 13-14 (emphasis in original).]¹¹

The *Hans* Court did acknowledge that the alternative holding of *Cohens v. Virginia* was contrary to the decision in *Hans*, but the Court dismissed that precedent in the following manner:

It must be conceded that the last observation of the chief justice does favor the argument of the plaintiff. But the observation was unnecessary to the decision, and in that sense *extrajudicial*, and, though made by one who seldom used words without due reflection, ought not to outweigh the important considerations referred to which lead to a different conclusion. [134 U.S. at 20 (emphasis in original).]

The *Hans* ruling, then, was based on a misreading of the words of Justice Iredell and of Hamilton, and a disregard for the words of Chief Justice Marshall. Even more, that opinion was based on a disregard for the words of the Eleventh Amendment. Yet this opinion became the foundation for modern analysis of the Eleventh Amendment.

B. The effect of *Hans* is continuing and profound, and thus the error of that decision cannot be considered to have outlived the period in which it profitably might be corrected.

1. This Court has stated that the significance of the Eleventh Amendment "lies in its affirmation that the fundamental principle of sovereign immunity limits the

¹¹ Other materials from the constitutional debates cited by the *Hans* Court are similarly addressed to the question of sovereign immunity in the diversity context. 134 U.S. at 14.

grant of judicial authority in Art. III." *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984); *see also, Atascadero State Hosp.*, 473 U.S. at 238. That statement is of course correct. But as we have seen, the "fundamental principle of sovereign immunity," both in its classical formulation and as understood by this Nation's founders, has no application when a state is sued in federal court upon a federal question. In their nature, federal questions are matters as to which the states are *not* sovereign.

In *Ex parte Virginia*, 100 U.S. 339, 346 (1880), this Court stated: "[E]very addition of power to the General Government involves a corresponding diminution of the governmental powers of the States. It is carved out of them." The obverse is equally true. To grant that states have an immunity from suits brought on matters as to which the federal government is sovereign is correspondingly to diminish the powers given to the federal government. An enhancement of the sovereignty of the states means a corresponding lessening of the sovereignty of the national government. If, as we have seen here, such enhancement was not intended by the Constitution, *Hans* improperly alters the constitutional scheme.

2. One hallmark of an unsatisfactory doctrine is the evolution of decisional law that is replete with fictions and anomalies. This Court's Eleventh Amendment jurisprudence stands as a prime example. In an effort to mitigate the effects that otherwise would result from *Hans*, a series of Eleventh Amendment rules have been developed by this Court, which are difficult to understand in light of the premises of the doctrine, and under which the existence of federal authority often turns on whether a variety of empty formalisms are observed. The problems are so acute that this Court's decisional law on the Eleventh Amendment has been described by one commentator as "a morass." Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit Upon the States*, 126 U. Pa. L. Rev. 1203, 1209 (1978) (hereinafter "Field, Part

Two"). That the sensitive balance between the state and federal power has come to depend on *ad hoc* adjustments to the rigor of the *Hans* rule is reason enough to reconsider the rule.

a. Various provisions of the Constitution place limitations on the powers of the states and confer rights on individuals as against the states. If left undiminished, *Hans* would have permitted the states to flout these constitutional commands—and to violate constitutional rights—without being subject to any court enforcement or sanction.¹² To mitigate these consequences, the Court in *Ex parte Young*, 209 U.S. 123 (1908), held that the Eleventh Amendment does not bar federal court actions against a state officer in his official capacity even though "official-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent," *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690 n.55 (1978).

The doctrine of *Ex parte Young* gives the federal courts some power to enforce against the states federal constitutional and statutory guarantees and to issue decrees that effectively bind the states. Indeed, as the Court observed in *Edelman v. Jordan*, 415 U.S. 651, 667-668 (1974), under that doctrine, where a state has been proven to have acted unlawfully, the federal courts may remedy the violation by issuing affirmative injunctions whose "necessary result" is to impose "fiscal consequences [on] state treasuries." Yet the Court in *Edelman* held that a judgment requiring that even a penny of compensation be paid to make whole the victim of the state's wrong is barred by the Eleventh Amendment on the theory that such an award "resembles far more closely [a] monetary award against the State itself." *Id.* at 665.

¹² The statement in text is certainly true with respect to enforcement or sanction in the federal courts, and presumably true as well for enforcement or sanction in the state courts. See *infra* at 27-28.

The Court in *Edelman* acknowledged that "the difference between the type of relief barred by the Eleventh Amendment and that permitted under *Ex parte Young* will not in many instances be that between day and night." 415 U.S. at 667. Subsequent cases bear that statement out and draw lines more nice than obvious between decrees having "an ancillary effect on the state treasury [which] is permissible." *id.* at 668, and decrees which "resemble[] far more closely [a] monetary award against the State itself," *id.* at 665. *See Hutto v. Finney*, 437 U.S. 678, 689-693 (1978); *Quern v. Jordan*, 440 U.S. 332 (1979).

b. Insofar as *Hans* immunizes the states from any liability for violating federal law, the decision effectively diminishes Congress' delegated powers, including its power to regulate interstate commerce. Unease with this consequence has led the Court to experiment with varying formulations for determining when and whether a state, by engaging in a federally-regulated activity, may be said to have waived its Eleventh Amendment protection against federal question suits. Compare *Parden v. Terminal R. Co.*, *supra*, 377 U.S. 184, 192-197 (1964), with *Edelman v. Jordan*, *supra*, 415 U.S. at 671-675, and *Atascadero State Hosp. v. Scanlon*, *supra*, 473 U.S. at 238 n.1, 241. This Court has suggested as well that Congress in exercising its power under the Commerce Clause can "lift" or "abrogate" the states' Eleventh Amendment immunity; a suggestion this Court may have to confront in this case if, contrary to our position, the Court determines not to overrule *Hans*. *See also Welch*, 107 S.Ct. at 2948 n.8.

Moreover, the Court has held that Congress, in exercising its power under the fifth section of the Fourteenth Amendment, can "lift" or "abrogate" the states' Eleventh Amendment immunity. *Atascadero State Hosp. v. Scanlon*, 473 U.S. at 242, *see also Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). And the Court has developed a set of unique rules of statutory construction to determine

whether Congress has effectively overridden the states' immunity. *See Atascadero State Hosp.*, *supra*.

Recognizing a power of Congress to abrogate the states' immunity does save some of the federal sovereignty from the incursions that otherwise would result from *Hans*. But it is difficult to square such a congressional power with the premise of *Hans*, *viz.*, that the Eleventh Amendment grants the states a *constitutional* immunity from federal question suits. *See Field*, Part Two, 126 U. Pa. L. Rev. at 1209-1218, 1230. And a doctrine under which federal authority depends upon the form of words used by Congress in exercising a sovereign authority demeans both Article I and the Eleventh Amendment.

c. In a final effort to mitigate the impact of *Hans*, the Court has grappled with, but has not resolved, the question whether the states must entertain suits in their own courts to enforce federal rights. Justice Marshall broached the issue in his concurring opinion in *Employees v. Missouri Public Health Dept.*, in which he stated:

While constitutional limitations upon the federal judicial power bar a federal court action by these employees to enforce their rights, the courts of the State nevertheless have an independent constitutional obligation to entertain employee actions to enforce those rights. *See Testa v. Katt*, 330 U.S. 386 (1947). *See also General Oil Co. v. Crain*, 209 U.S. 211 (1908). [411 U.S. at 298.]

The Court in *Atascadero State Hosp.*, *supra*, 473 U.S. at 238 n.2, seems to have given some credence to this view:

Justice BRENNAN's dissent also argues that in the absence of jurisdiction in the federal courts, the States are "exempt[] . . . from compliance with laws that bind every other legal actor in our nation." *Post*, at 3150. This claim wholly misconceives our federal system. As Justice MARSHALL has noted, "the issue is not the general immunity of the States from private suit . . . but merely the susceptibility of the States to suit before federal tri-

bunals." *Employees v. Missouri Public Health & Welfare Dept.*, *supra*, 411 U.S., at 293-294, 93 S.Ct., at 1622-1623 (MARSHALL, J., concurring in the result) (emphasis added). It denigrates the judges who serve on the state courts to suggest that they will not enforce the supreme law of the land. See *Martin v. Hunter's Lessee*, 1 Wheat. 304, 341-344, 4 L.Ed. 97 (1816). See also *Stone v. Powell*, 428 U.S. 465, 493, n.35, 96 S.Ct. 3037, 3052, n.35, 49 L.Ed. 1067 (1976), and *post*, at 3155, n.8.

See also *Welch*, 107 S.Ct. at 2953.

Thus, to assure that federal rights are fully enforceable as against the states the Court has suggested that, as a matter of federal law, state courts may be compelled to entertain federal law claims against states, notwithstanding whatever sovereign immunity the states otherwise enjoy from being sued in their own courts. But, of course, this "solution" to the problem posed by *Hans* would turn our system of bifurcated sovereignties on its head by requiring the federal government to rely on state courts for enforcement of federal statutory and constitutional rights. See *Fletcher*, *supra*, 35 Stanford L. Rev. at 1098. Even more paradoxically, the "fundamental principle of sovereign immunity," which purportedly requires protection of the states against federal question suits in the federal courts, would under this view provide them no similar protection in their own courts.

These problems of Eleventh Amendment jurisprudence are all attributable to the "wrong turn" taken in *Hans*.¹³ A return to the principles intended by the framers of the Eleventh Amendment would eliminate these problems. The federal government would be given back the full measure of sovereignty intended by the Constitution. And no fictions or artificial constructions would be necessary to permit the federal government to do its intended job.

¹³ See Shapiro, *Wrong Turns: The Eleventh Amendment and the Pennhurst Case*, 98 Harv. L. Rev. 61 (1984).

IV. THE QUESTION OF *STARE DECISIS*

Justice Powell, in his concurring opinion in *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 627-628 (1974), accurately summarized the doctrine of *stare decisis* as it has been applied by this Court to issues of constitutional interpretation:

To be sure, *stare decisis* promotes the important considerations of consistency and predictability in judicial decisions and represents a wise and appropriate policy in most instances. But that doctrine has never been thought to stand as an absolute bar to reconsideration of a prior decision, especially with respect to matters of constitutional interpretation. Where the Court errs in its construction of a statute, correction may always be accomplished by legislative action. Revision of a constitutional interpretation, on the other hand, is often impossible as a practical matter, for it requires the cumbersome route of constitutional amendment. It is thus not only our prerogative but also our duty to re-examine a precedent where its reasoning or understanding of the Constitution is fairly called into question. And if the precedent or its rationale is of doubtful validity, then it should not stand. As Mr. Chief Justice Taney commented more than a century ago, a constitutional decision of this Court should be "always open to discussion when it is supposed to have been founded in error, [so] that [our] judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported." *Passenger Cases*, 7 How. 283, 470 (1849). [Footnote omitted.]

See, e.g., *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528, 546-547 (1985); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

The conditions for overruling a constitutional precedent are met in this case. *Hans*, as we have shown, is clearly in error as to the scope of an amendment to the Constitution. That error has resulted in a fundamental distortion in the balance of power as between the basic governmental units in our federal system: the sovereignty of the states has been improperly enhanced at the

expense of the sovereignty of the national government. *See supra* at 23-24. Moreover, in order to mitigate the practical consequences of that error, this Court has had to create a legal patchwork of fictions and empty formalisms, often leading to anomalous results. *See supra* at 24-28. In these circumstances, *stare decisis* should be no barrier to correction of the error of *Hans*.

Moreover—while the issue is of great moment in terms of the integrity of our constitutional scheme—as a practical matter, overruling *Hans* likely would cause little, if any, disruption to settled expectations as to the application of existing statutes. If there is no constitutional bar to subjecting states to suit in federal courts in federal question cases, the question would remain, did Congress intend such a result in enacting any particular statute.

The answer to that question will in all likelihood require reference to the state of this Court's Eleventh Amendment jurisprudence at the time the statute was enacted. In enacting legislation, Congress is presumed to be aware of, and to take into account, relevant prevailing interpretations of the Constitution by this Court. *See, e.g., F.P.C. v. Tuscarora Indian Nation*, 362 U.S. 99, 113 (1960). If, for example, a statute was enacted at a time when *Parden* and *Missouri Health Dept.* stated this Court's view as to when and how Congress may "lift" a state's Eleventh Amendment immunity, then the congressional intent would have to be determined against the backdrop of those decisions. Thus, as respects *statutes already enacted*, this Court's existing Eleventh Amendment decisional law will play a continuing role: those decisions will provide a framework for discerning whether Congress intended a statute to apply to the states. *See Welch*, 107 S.Ct. at 2958 (Justice Scalia, concurring).

CONCLUSION

For the foregoing reasons, the decision of the court below should be affirmed.

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No. 87-1241

(10)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

COMMONWEALTH OF PENNSYLVANIA,
v.
Petitioner,

UNION GAS COMPANY,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Third Circuit

BRIEF FOR
THE CHEMICAL MANUFACTURERS ASSOCIATION
AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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**BRIEF FOR
THE CHEMICAL MANUFACTURERS ASSOCIATION
AS AMICUS CURIAE IN SUPPORT OF RESPONDENT**

INTEREST OF AMICUS CURIAE¹

The Chemical Manufacturers Association (CMA) is a nonprofit trade association whose member companies represent more than 90 percent of the productive capacity for basic industrial chemicals in the United States. CMA member companies are major contributors to the federal Superfund trust fund and are involved in hazardous waste cleanup actions at numerous sites around the country. On the basis of its experience in Superfund matters, CMA has concluded that state liability to private parties is an essential element in a well-balanced and workable cleanup program. The Court's decision in this case regarding liability of states to suit under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)² will directly affect the interests of CMA's members and the fairness and efficiency of the federal hazardous waste cleanup program.

SUMMARY OF ARGUMENT

1. When Congress enacted CERCLA in 1980, it intended to permit private parties to recover cleanup costs from states whenever they fall into one of the categories of responsible parties, including "owners and operators," defined by the statute. In prior proceedings in this case,³ however, the Court of Appeals dismissed respondent's third-party complaint against Pennsylvania, which owned

¹ By letters filed with the Clerk of the Court, petitioner and respondent have consented to the filing of this brief.

² Pub. L. No. 96-510, 94 Stat. 2767 (1980), codified at 42 U.S.C. § 9601 *et seq.* (1982), as amended by the Superfund Amendments and Reauthorization Act, Pub. L. No. 99-499, 100 Stat. 1613 (1986).

³ *United States v. Union Gas Co.*, 792 F.2d 372 (3d Cir. 1986), Pet. App. 74a-138a (*Union Gas I*), vacated and remanded *sub nom. Union Gas Co. v. Pennsylvania*, 107 S. Ct. 865 (1987).

the site in question and allegedly caused the release of hazardous substances from the site. In response, in 1986, Congress amended CERCLA's definition of "owner or operator" to correct the Court of Appeals' interpretation of the 1980 statute. Pub. L. No. 99-499, § 101(b), codified at 42 U.S.C.A. § 9601(20)(D) (West Supp. 1988). Even under a rigorous application of the "clear statement rule," the 1986 amendments are sufficiently clear to abrogate a state's immunity when the state caused or contributed to the release of a hazardous substance at a site that it owns or operates.

2. Since *Hans v. Louisiana*, 134 U.S. 1 (1890), this Court has held that a state enjoys immunity from suits brought by its own citizens in federal court on a federal cause of action. The historical record shows clearly, however, that *Hans* was wrongly decided. The Eleventh Amendment limited federal court jurisdiction over state-citizen diversity suits to suits by states as plaintiffs, but left undisturbed the Article III jurisdiction of federal courts over federal question suits against states. It is time for this Court to overrule *Hans*, thereby restoring Article III and the Eleventh Amendment to their intended meanings.

The principles underlying *stare decisis* do not require this Court to perpetuate its historical errors concerning the Eleventh Amendment. States have no vested interest in violating federal law, and existing sovereign immunity doctrine is too unpredictable to give rise to stable expectations regarding the financial consequences of noncompliance. In addition, the great majority of states have recognized that sovereign immunity produces unjust results and have renounced the defense in their own courts. Within the federal system, the excessively broad interpretation of sovereign immunity originated in *Hans v. Louisiana* is inconsistent with more recent developments in related areas of the law.

3. Even if the Eleventh Amendment is held to apply generally to federal question cases, Congress may abro-

gate sovereign immunity without the state's consent when it enacts legislation under its Article I powers. To the extent that the Constitution granted law-making powers to the federal government, it divested the states of sovereignty—the conceptual basis for sovereign immunity. Private suits against states for money damages are often necessary to implement federal statutory policies and to vindicate the supremacy of federal law. Once Congress has authorized such suits, there should be no further requirement of actual or constructive waiver of immunity by the state.

ARGUMENT

I. Congress Unequivocally Expressed Its Intent to Permit Private Parties to Recover Cleanup Costs from States That Own or Operate Hazardous Waste Sites and Cause or Contribute to the Release of Hazardous Substances.

Acting pursuant to its Commerce Clause powers, Congress enacted CERCLA in 1980 to meet a perceived need for the cleanup of inactive hazardous waste sites. CERCLA rests on the fundamental principle that responsible parties, if they can be identified, should bear the costs of cleaning up a facility from which there is a release or threatened release of a hazardous substance.⁴ Responsible parties include "any person owning or operating" such a facility and "any person" who generated or transported hazardous wastes that were dumped at the facility. 42 U.S.C. §§ 9601(20)(A)(ii), 9607(a) (1982). The statutory definition of "person" expressly includes states and other governmental entities, including the United States itself. *Id.* § 9601(21).

In the present case, petitioner, the Commonwealth of Pennsylvania, asks this Court to upset the carefully crafted Congressional scheme by erecting a constitutional barrier that would allow a state to escape liability to private parties for money damages or contribution, even in

⁴ See S. Rep. No. 848, 96th Cong., 2d Sess. 33-34 (1980).

situations where the state concedes that it is a responsible party which caused or contributed to the release of hazardous substances at a site that it owns or operates. Acceptance of this position could seriously impair the fair and efficient implementation of CERCLA.

To a large extent, success in the effort to clean up our nation's hazardous waste sites depends on voluntary actions undertaken either by responsible parties, who might otherwise be compelled to conduct or pay for the cleanup of a particular site, or by innocent parties, whose property has been contaminated by the release of hazardous substances from a site with which the party has no connection. To encourage voluntary cleanup activity, Congress provided a right to recover cleanup costs, or to seek contribution, from all responsible parties. *See* 42 U.S.C.A. §§ 9607(a), 9613(f)(1) (West Supp. 1988).

Immunizing states against suits brought by private parties seeking money damages or contribution under CERCLA would strongly discourage private parties from undertaking voluntary cleanup actions or entering into settlement agreements whenever a state is a responsible party at a site, particularly if the state is one of the few responsible parties with substantial assets from which compensation might be sought. By the same token, if granted constitutional immunity from suit, states would have a strong incentive not to participate in voluntary cleanup activity but, instead, to remain on the sidelines, hoping that private parties will perform or pay for the cleanup and then be barred from recovering a pro rata share from the state. In short, the position Pennsylvania urges upon the Court could seriously frustrate our nation's ability to achieve the prompt and efficient cleanup of hazardous waste sites contemplated by Congress. Moreover, it would be grossly unfair and radically inconsistent with the statutory scheme that Congress believed it had enacted into law.

For almost six years, Congress reasonably assumed that the 1980 legislation subjected states, like all other

responsible parties under CERCLA, to private actions for cleanup costs in appropriate cases. States, after all, were expressly included within the statutory definition of "person" and thus could logically be presumed to share the same sorts of liability as other responsible parties under the Act.

In June 1986, however, a divided panel of the United States Court of Appeals for the Third Circuit held that respondent Union Gas Company could not file a third-party complaint against the Commonwealth of Pennsylvania for its share of the cost of cleaning up a hazardous waste site that it owned. Union Gas alleged that the state's actions had caused the release of hazardous wastes at the site, which the state had acquired voluntarily from the local government. According to the Court of Appeals, however, the suit was barred by the Eleventh Amendment because CERCLA, as enacted in 1980, did not spell out with sufficient clarity that Congress intended to allow private parties to recover cleanup costs from states.⁵

Congress acted promptly to remedy the problem created by the Third Circuit's decision on owner and operator liability in *Union Gas I*. At the time of that decision, the Senate and House versions of a CERCLA reauthorization bill were being considered in conference committee. The Senate bill, presupposing that states were liable as "owner[s] or operator[s]" under the 1980 Act, contained a provision designed to limit their liability in that capacity by redefining the term "owner or operator" so as to exclude a state or local government that had acquired a hazardous waste site involuntarily by virtue of its func-

⁵ *Union Gas I*, Pet. App. 97a-117a. The Court of Appeals found that the 1980 statute did not satisfy the "clear statement rule" set forth by this Court in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985). Whether or not that holding was correct, it was mooted by the CERCLA amendments enacted in 1986. Moreover, if this Court holds that state sovereign immunity does not extend to private suits under CERCLA, *see infra*, the "clear statement rule" is inapplicable and private parties may recover cleanup costs from states whenever they are responsible parties.

tion as sovereign.⁶ In the wake of the *Union Gas I* decision, the conference committee, while accepting the Senate limitation, added language designed to make clear that a private party may sue a state in federal court to recover cleanup costs in all cases where the state has "caused or contributed to" the release of a hazardous substance at a facility that it owned or operated. The conference committee language provided that such a state or local government is "subject to the provisions of . . . [CERCLA] in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 107," even if it acquired the property involuntarily. Pub. L. No. 99-499, § 101(20) (D), codified at 42 U.S.C.A. § 9601(20) (D) (West Supp. 1988).⁷ Virtually identical language in the 1980 and 1986 legislation subjects the federal government to private damage suits in federal court.⁸

As the United States observed when it recommended that this Court remand *Union Gas I* for reconsideration in light of the 1986 amendments: "This new legislation

⁶ 131 Cong. Rec. S12,185 (daily ed. Sept. 26, 1985). Senator Stafford, cosponsor of the amendment, told the Senate that the "amendment does not diminish the liability of these governments with respect to sites which they might have owned or operated in their own right." *Id.* at S11,619 (daily ed. Sept. 17, 1985).

⁷ The conference report explained that the definition of "owner or operator" was being modified "to clarify that if the unit of government caused or contributed to the release or threatened release in question, then such unit is subject to the provisions of CERCLA, both procedurally and substantively, as any non-governmental entity, including liability under section 107 and contribution under section 113." H.R. Rep. No. 962, 99th Cong., 2d Sess. 185-86 (1986).

The 1986 amendments codified the judicially-recognized right of contribution, which Congress and the Administration deemed necessary to distribute losses fairly and to encourage prompt cleanup efforts. 42 U.S.C.A. § 9613(f) (West Supp. 1988); H.R. Rep. No. 253 (Part 1), 99th Cong., 1st Sess. 79-80, 136 (1985). Contribution actions, like other suits brought under CERCLA, are within the exclusive jurisdiction of the federal courts. 42 U.S.C. § 9613(b) (1982).

⁸ Pub. L. No. 99-499, § 120(a)(1), codified at 42 U.S.C.A. § 9620 (a)(1) (West Supp. 1988); see 42 U.S.C. § 9607(g) (1982).

. . . directly addresses the question of state immunity, and authorizes suits against states or local governments for liability or contribution when such entities caused or contributed to the release or threatened release of a hazardous substance."⁹

Petitioner, which voluntarily acquired the property at issue in this case, attempts to escape the reach of the 1986 amendment by claiming that the liability language refers only to state governments that have acquired sites involuntarily.¹⁰ This proposed reading distorts the overall structure and language of the statute and makes absolutely no sense as a matter of policy. It is difficult to conceive of any reason to impose liability on a state that "caused or contributed" to the release of a hazardous substance at a site it acquired *involuntarily* by virtue of its sovereign functions, while exonerating a state that "caused or contributed" to the release of a hazardous substance at a site it acquired *voluntarily*. To the contrary, as one would expect, Congress has been quicker to impose liability in the case of a voluntary acquisition. For example, 42 U.S.C. § 9601(35)(A)(ii) allows a governmental entity that acquired a site involuntarily or through the exercise of eminent domain to qualify for the so-called "innocent purchaser" defense more readily than a state that acquired a site voluntarily.¹¹

⁹ Brief for the United States as Amicus Curiae at 5-6, *Union Gas I* (No. 86-597) (U.S., filed Dec. 11, 1986), *vacated and remanded*, 107 S.Ct. 865 (1987).

¹⁰ Petitioner also claims that Congress did not abrogate state immunity even in this narrow category of instances, because the provision does not include the words "Eleventh Amendment," even though it subjects states to "liability under section 107" "in the same manner . . . as any nongovernmental entity." Pub. L. No. 99-499, § 101(20)(D), codified at 42 U.S.C.A. § 9601(20)(D) (West Supp. 1988). If this remarkable assertion were accepted, the final clause of § 101(20)(D) would be meaningless.

¹¹ Compare 42 U.S.C.A. § 9601(35)(A)(ii) with *id.* § 9601(35)(A)(i) (West Supp. 1988). In any event, if the defendant "caused or contributed" to release of a hazardous substance, it forfeits the

In the 1986 amendments, Congress also added an exception to state liability that would be superfluous if, as petitioner asserts, the amended definition of “owner or operator” authorizes private damage suits only against states that acquired property involuntarily and caused or contributed to the release of hazardous substances. Section 104(j)(3), added in 1986, specifies that when the federal government acquires an interest in real property in order to conduct a hazardous waste cleanup and subsequently transfers the property to a state pursuant to a contract or cooperative agreement, the state will not be liable under CERCLA “solely as a result of acquiring an interest in real estate under this subsection.” 42 U.S.C.A. § 9604(j)(3) (West Supp. 1988). In this situation, the state acquired the property *voluntarily* and is not likely to be sued by the federal government, which had transferred the property to the state. Thus, Congress must have believed the exemption was necessary to protect states against suits by private parties.

In short, petitioner’s suggestion that Congress limited its 1986 response to *Union Gas I* to sites acquired involuntarily by states simply cannot be squared with the language or structure of the statute or any conceivable notion of public policy. As the Court of Appeals concluded on remand, in the 1986 amendments, “Congress enacted the unmistakably clear statutory language that demon-

innocent purchaser defense even if it acquired the site involuntarily. *Id.* § 9601(35)(D).

Similarly, when money from the federal Superfund trust fund is used to help finance a site cleanup within a state, CERCLA imposes a lower initial cost-sharing percentage on a state that was merely a passive owner—particularly an involuntary owner—than on a state that operated the site and contributed to the hazardous waste problem. 42 U.S.C. §§ 9604(e)(3)(C), 9601(20)(D) (West Supp. 1988); *Superfund: Hearings Before the Subcomm. on Commerce, Transportation, and Tourism of the House Comm. on Energy and Commerce*, 99th Cong., 1st Sess. 30 (1985); *cf.* 42 U.S.C. § 9604(e)(3)(C) (1982); S. Rep. No. 848, *supra* note 4, at 58-59.

strates its intent to abrogate the states’ eleventh amendment immunity” whenever a state has “caused or contributed” to the release of a hazardous substance at a site that it owned or operated.¹²

Since petitioner’s assertions regarding Congressional intent are without merit, this case squarely presents constitutional issues regarding the proper interpretation of the Eleventh Amendment. We now turn to these issues.

II. The Court Should Correct Fundamental Errors in Eleventh Amendment Analysis and Declare that States Enjoy Immunity from Suit in Federal Court Only in Pure Diversity Cases.

The Eleventh Amendment provides: “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. Const. amend. XI. Despite the amendment’s clear focus on diversity of citizenship, the Court, since its decision in *Hans v. Louisiana*, 134 U.S. 1 (1890), has held that a state also enjoys immunity from suits brought by its own citizens in federal court on a federal cause of action.¹³

Since the mid-1970s, a number of scholars have re-examined the historical roots of sovereign immunity doctrine and have concluded that *Hans* was wrongly decided.¹⁴ Four Justices of this Court have repeatedly urged

¹² Pet. App. 21a-22a (opinion below). See *United States v. Freedman*, 680 F. Supp. 73, 77 (W.D.N.Y. 1988) (“To conclude that Congress did not intend to abrogate the states’ immunity to suit under such circumstances would require a contortion of the language and legislative history of section 101(20)(D).”); *Wickland Oil Terminals v. Asarco, Inc.*, 654 F. Supp. 955 (N.D. Calif. 1987).

¹³ The present case falls within this category, because Union Gas Company is a citizen of Pennsylvania and the cause of action arises under CERCLA, a federal statute. J.A. 7a.

¹⁴ See, e.g., Jackson, *The Supreme Court, the 11th Amendment and State Sovereign Immunity*, 98 Yale L. J. 1 (forthcoming, Oc-

that *Hans* be overruled.¹⁵ Last Term, concurring separately in a sovereign immunity case, Justice Scalia wrote:

I find both the correctness of *Hans* as an original matter, and the feasibility, if it was wrong, of correcting it without distorting what we have done in tacit reliance upon it, complex enough questions that I am unwilling to address them in a case whose presentation focused on other matters.¹⁶

The time has now come to address those questions.¹⁷ Recent scholarship has persuasively demonstrated that *Hans v. Louisiana* rests on serious misconceptions regarding both Article III and the Eleventh Amendment. Principles of *stare decisis* do not support adherence to such a flawed precedent, notwithstanding its age. To the contrary, overruling *Hans* would permit the development of a sound doctrinal structure, consistent with the text of the Constitution, the intent of the Framers, and the principles of federalism reflected in related areas of the law.

A. The Eleventh Amendment Applies Only to Cases Brought Against States Under the State-Citizen Diversity Provisions of Article III, Section 2.

Article III, Section 2 of the United States Constitution confers two distinct types of jurisdiction on the federal

tober 1988); J. Orth, *The Judicial Power of the United States* (1987); Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 Colum. L. Rev. 1889 (1983); Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 Stan. L. Rev. 1033 (1983).

¹⁵ See *Welch v. Texas Dep't of Highways and Public Transp.*, 107 S. Ct. 2941, 2962-68 (1987) (Brennan, J., dissenting); *Papasan v. Allain*, 478 U.S. 265, 292-93 (1986); *Green v. Mansour*, 474 U.S. 64, 74 (1985) (Brennan, J., dissenting); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 247-302 (1985) (Brennan, J., dissenting).

¹⁶ *Welch*, 107 S. Ct. at 2957-58.

¹⁷ In contrast with the briefs of the parties in *Welch*, the brief of respondent Union Gas sets forth the reasons for this Court to overrule *Hans v. Louisiana*.

courts: jurisdiction based on the identity of the parties (without regard to subject matter), and jurisdiction based on the subject matter of the action (without regard to the parties' identity). Among the party-based grounds of jurisdiction are "Controversies . . . between a State and Citizens of another State; . . . and between a State . . . and foreign States, Citizens or Subjects" (the "state-citizen diversity clauses"). The principal grounds of subject matter jurisdiction are "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made under their Authority" and "all Cases of admiralty and maritime Jurisdiction."

In exploring sovereign immunity and Eleventh Amendment issues, it is therefore useful to divide the universe of theoretically conceivable private lawsuits against states into four categories, defined by the citizenship of the plaintiff and the subject matter of the lawsuit:

- (1) suits against a state by a non-citizen (either a citizen of another state or of a foreign country) that are not based on subject matter enumerated in Article III;
- (2) suits against a state by one of its own citizens that are not based on Article III subject matter;
- (3) suits against a state by a non-citizen, based on subject matter enumerated in Article III; and
- (4) suits against a state by one of its own citizens, based on Article III subject matter.

Lawsuits in Categories (1) and (2) are outside the Article III grants of jurisdiction based on subject matter. Since Category (2) suits also are not included in any of the party-based grounds of jurisdiction, the federal courts have never had any authority to hear and decide such suits. In contrast, under Article III as originally adopted, the state-citizen diversity clauses gave the federal courts jurisdiction over Category (1) suits, which may be viewed as "pure diversity" actions against states. The Framers believed that a neutral forum should be

available to hear such disputes in the interests of "the Natl. peace & harmony."¹⁸

To be sure, the inclusion of "pure diversity" suits against states in Article III was controversial. Opponents of the Constitution vigorously objected that it would allow states to be brought into federal court as defendants in debt enforcement cases.¹⁹ For precisely the same reason, some supporters of the Constitution, such as Edmund Randolph, sponsor of the Virginia Plan at the Constitutional Convention, argued that the Constitution should be applauded.²⁰ Other supporters, however, including James Madison, Alexander Hamilton, and John Marshall, asserted that creditors could not make states involuntary defendants in federal court. These assurances were politically expedient and may have been disingenuous.²¹ In any event, since the statements of Madison, Hamilton, and Marshall could have been based on the common law defense of sovereign immunity in suits based on state law,²² they do not support the proposition that the original Article III must be construed to exclude "pure diversity" suits against states.²³

In contrast to the heated debate over Category (1) "pure diversity" suits, the establishment of Article III

¹⁸ Fletcher, *supra* note 14, at 1046 & n.55 (quoting resolution of the Constitutional Convention).

¹⁹ See Gibbons, *supra* note 14, at 1902-14; Fletcher, *supra* note 14, at 1047-52.

²⁰ Gibbons, *supra* note 14, at 1906; *see id.* at 1907-08.

²¹ Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. Pa. L. Rev. 515 (1977); Gibbons, *supra* note 14, at 1903-06, 1908.

²² Field, *supra* note 21, at 536-38.

²³ Indeed, the ratifying conventions of several states proposed—without success—that the Constitution be amended to guarantee state sovereign immunity. Rhode Island's proposal explicitly stated that suits concerning payment of the state's public securities could not be entertained. Fletcher, *supra* note 14, at 1051-52. These amendments would have been unnecessary if "pure diversity" suits against states were outside the scope of Article III.

jurisdiction over Category (3) and (4) suits against states—those involving questions of federal law and admiralty—aroused little controversy.²⁴ In the Federalist Papers, Alexander Hamilton asserted forcefully that federal courts must have the power to decide suits against states in order to enforce constitutional guarantees.²⁵ On the anti-Federalist side, a leading pamphleteer acknowledged that the federal courts should have "the power of deciding finally on the laws of the union."²⁶

Article III, in short, originally gave the federal courts power over suits against states based solely on diversity of citizenship, as well as those involving enumerated subject matter regardless of diversity. As Judge Gibbons concluded after a thorough review of the historical record, "[a] few isolated remarks notwithstanding, in those states in which the ratifying conventions discussed the issue, the best evidence is that each convention interpreted the judiciary article, as originally written, to allow the states to be sued in the federal courts."²⁷

Thus, *Chisholm v. Georgia*, 2 U.S. (2 Dall. 419) (1793), correctly upheld federal power over a Category (1) pure diversity case—a suit against a state by a citi-

²⁴ The Virginia ratifying convention proposed to eliminate the lower federal courts, but its amendment would have preserved Supreme Court jurisdiction over cases arising under future treaties and involving states as parties. Gibbons, *supra* note 14, at 1908. Similarly, according to Hamilton, "The most bigoted idolizers of State authority have not thus far shown a disposition to deny the national judiciary the cognizance of maritime causes. These so generally depend on the laws of nations, and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public peace." *The Federalist No. 80*, at 502 (A. Hamilton) (B. Wright ed. 1961).

²⁵ *Id.* at 500, 502.

²⁶ *Letters from a Federal Farmer*, in 14 *The Documentary History of the Ratification of the Constitution* 14, 40 (J. Kaminski & G. Saladino eds. 1983).

²⁷ Gibbons, *supra* note 14, at 1913. *See New Hampshire v. Louisiana*, 108 U.S. 76, 91 (1883) (originally, Article III permitted out-of-state citizen to sue another state).

zen of another state based on a common-law cause of action. In order to protect states from federal court enforcement of their debts, the Eleventh Amendment overturned the *Chisholm* decision. One proposed constitutional amendment would have eliminated federal court jurisdiction over federal question cases as well as pure diversity cases against states,²⁸ but Congress selected and the states ratified a narrower formulation. The language of the Eleventh Amendment parallels that of the state-citizen diversity clauses of Article III, the only source of federal jurisdiction over Category (1) cases.

The record surrounding the ratification of the Eleventh Amendment is sparse, but 19th-century evidence strongly suggests that the amendment did not eliminate federal jurisdiction over any suits other than those in Category (1).²⁹ The language of the amendment did not encompass Category (4) suits by citizens against their own states based on Article III subject matter.³⁰ Although the amendment eliminated diversity as a ground for federal court jurisdiction over Category (3) suits against states, it did not disturb the alternative ground, Article III subject matter. Thus, in an 1809 decision cited as good law throughout the 19th century, a Justice of the Supreme Court riding circuit upheld federal court jurisdiction over admiralty suits against states.³¹ Exercising the "judicial power of the United States," the Supreme

²⁸ "That no state shall be liable to be made a party defendant in any of the judicial courts, established, or which shall be established under the authority of the United States, at the suit of any person or persons whether a citizen or citizens, or a foreigner or foreigners, of any body politic or corporate, whether within or without the United States." *Fletcher, supra* note 14, at 1058-59.

²⁹ See *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 798 (1824); *Gibbons, supra* note 14, at 1941-56; *J. Orth, supra* note 14, at 76-77.

³⁰ See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 412 (1821).

³¹ *United States v. Bright*, 24 Fed. Cas. 1232, 1236 (D. Pa. 1809) (Washington, J.); see *Gibbons, supra* note 14, at 1944-45; *Fletcher, supra* note 14, at 1078-83.

Court reviewed state court judgments granting or denying monetary relief sought by private persons against states on federal law grounds.³²

In *Hans v. Louisiana*, however, the Court ignored the fundamental distinction between suits based on the subject-matter grounds enumerated in Article III and suits based solely on the state-citizen diversity clauses. The Court began with the erroneous assumption that the framers of the original Constitution had not intended to subject states to any unconsented suits by private parties in federal court. The Court further assumed that the Eleventh Amendment restored the "original understanding" by prohibiting all suits in federal court against states by non-citizens—whether or not a federal question was presented. Building on this unsound foundation, the court concluded that, even though the language of the Eleventh Amendment did not refer to suits against a state by its own citizens, it would be anomalous to allow any such suits while barring all suits against a state by non-citizens.³³ Accordingly, it held that principles of sovereign immunity also barred federal jurisdiction over suits brought by a citizen against his own state when the cause of action arises under federal law.

The anomaly perceived by the *Hans* opinion, however, did not exist. As shown above, the Framers intended to subject states to suit on federal questions in federal courts without regard to the citizenship of the plaintiff. The anti-Federalists did not question this authority; the

³² See, e.g., *Curran v. Arkansas*, 56 U.S. (15 How.) 304 (1853); see *Jackson, supra* note 14. This practice has continued to the present day. See, e.g., *Employment Div., Dep't of Human Resources v. Smith*, 108 S. Ct. 1444 (1988); *Exxon Corp. v. Hunt*, 475 U.S. 355 (1986); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). A forthcoming article in the *Yale Law Journal* demonstrates that this Court's appellate jurisdiction over such cases is inconsistent with the proposition that Article III bars federal jurisdiction over suits against states based on federal law. *Jackson, supra* note 14.

³³ 134 U.S. at 15.

Eleventh Amendment left it in place. Only when faced with the massive problem of debt repudiation by Southern states in the aftermath of Reconstruction did the Court first decide otherwise.³⁴ But its analysis in *Hans v. Louisiana* was unsound and inconsistent with the supremacy of federal law. Accordingly, the Court should return to the original understanding of both Article III and the Eleventh Amendment by declaring that the Amendment applies only to pure diversity cases.

B. The Policies Underlying *Stare Decisis* Should Not Prevent the Overruling of *Hans v. Louisiana*.

Since *Hans* is now deemed to have been a constitutional holding, only this Court can remedy the mistake.³⁵ As Justice Brandeis wrote, "in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning...."³⁶

The principles underlying *stare decisis* do not require this Court to perpetuate its historical errors in *Hans* and subsequent cases.³⁷ Justifiable reliance and stable expectations are not at stake here. This Court has held that governmental entities may not claim a vested interest in violating the federal Constitution and laws with

³⁴ J. Orth, *supra* note 14, at 47-89; Gibbons, *supra* note 14, at 1968-2002.

³⁵ See *Edelman v. Jordan*, 415 U.S. 651, 671 (1974): "Since we deal with a constitutional question, we are less constrained by the principle of *stare decisis* than we are in other areas of the law."

³⁶ *Burnet v. Colorado Oil & Gas Co.*, 285 U.S. 393, 406-08 (1932) (Brandeis, J., dissenting), quoted in *Edelman*, 415 U.S. at 671.

³⁷ See, e.g., *Erie Ry. Co. v. Tompkins*, 304 U.S. 64, 72-73 (1938), overruling *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842); *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976), overruling *Low v. Austin*, 80 U.S. (13 Wall.) 29 (1872); *Monell v. New York City Dep't of Social Services*, 436 U.S. 658, 700 (1978) (municipalities may be sued under 42 U.S.C. § 1983 for violating federal Constitution or laws), overruling *Monroe v. Pape*, 365 U.S. 167 (1961).

impunity.³⁸ Even with regard to the financial consequences of noncompliance with federal law, existing sovereign immunity doctrine has not permitted states to develop settled expectations of non-liability. Sovereign immunity rules have been unstable and difficult to apply; they also leave states exposed to substantial financial burdens under a variety of exceptions to immunity.³⁹

Any claim of justifiable reliance on sovereign immunity in federal court is further undermined by states' own policies and practices. To a substantial degree, states have recognized the injustice of refusing to allow persons harmed by tortious state action to recover money judgments in state court. In contrast to the situation in 1890,⁴⁰ the great majority of states have now con-

³⁸ *Monell*, 436 U.S. at 700; cf. *United States v. Ross*, 456 U.S. 798, 824 & n.33 (1982) (any interest in status quo that might be asserted by violators of law "clearly would not be legitimate").

³⁹ See *Milliken v. Bradley*, 433 U.S. 267, 289 (1977) (state must pay for remedial education program notwithstanding "direct and substantial impact on the state treasury"); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (states are subject to backpay awards for violations of Title VII of the Civil Rights Act of 1964); *Employees of the Dep't of Public Health & Welfare v. Department of Public Health & Welfare*, 411 U.S. 279, 286 (1973) (Secretary of Labor may bring suit for unpaid minimum wages on behalf of individual employees); *id.* at 284 ("when Congress does act, it may place new or even enormous fiscal burdens on the States").

In the present case, the Commonwealth of Pennsylvania could not justifiably have assumed that it would never be liable in federal court for a share of the costs of cleaning up the Brodhead Creek site. First, as the state admits, there is no Eleventh Amendment immunity from suit by the federal government for money damages. Brief for Petitioner at 42. Second, this Court has left open the question whether Congress has authority to subject unconsenting states to suit in federal court when it exercises its powers under Article I. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 252 (1985). Pennsylvania could therefore not reasonably have relied on the absence of liability even in a suit by a private party such as respondent.

⁴⁰ Very few states had consented to tort liability and their waivers of immunity were limited in scope. A New York statute, for example, permitted recovery against the state only for certain in-

sented to at least some tort liability.⁴¹ In rejecting continued sovereign immunity, state courts across the country have described the doctrine as unjust and anachronistic.⁴² Since so many states have renounced sovereign immunity even in their own courts, where they retain a measure of sovereignty, they should certainly not be accorded a right to rely on immunity from suit in the federal courts, where they are not coequal sovereigns.⁴³

Nor would preserving the reasoning and result of *Hans v. Louisiana* enhance the orderliness and stability of the law. The Court's decisions on sovereign immunity have repeatedly questioned, undermined, or overruled prior cases.⁴⁴ The Court itself has acknowledged that sovereign

juries arising from the construction or operation of canals. *Sipple v. State*, 99 N.Y. 284, 1 N.E. 892 (1885). See *Murdock Parlor Grate Co. v. Commonwealth*, 152 Mass. 28, 24 N.E. 854 (1890); 1 T. Shearman & A. Redfield, *A Treatise on the Law of Negligence* § 249 (4th ed. 1888); Annot., *What claims constitute valid demands against a state*, 42 L.R.A. 33, 64-69 (1899).

⁴¹ *Prosser and Keeton on the Law of Torts* 1044-45 (W. Keeton 5th ed. 1984).

⁴² See, e.g., *Stone v. Arizona Highway Comm'n*, 93 Ariz. 384, 381 P.2d 107, 109, 113 (1963); *Muskopf v. Corning Hospital Dist.*, 55 Cal. 2d 211, 212, 359 P.2d 457, 458, 11 Cal. Rptr. 89, 90 (1961), modified sub nom. *Corning Hospital Dist. v. Superior Court*, 57 Cal. 2d 488, 370 P.2d 325, 20 Cal. Rptr. 621 (1962); *Willis v. Department of Conservation & Economic Dev.*, 55 N.J. 534, 264 A.2d 34, 36 (1970); *Campbell v. State*, 259 Ind. 55, 284 N.E.2d 733, 736-37 (1972).

⁴³ See *Owen v. City of Independence*, 445 U.S. 622, 647-48 (1980) (Congress is "the supreme sovereign on matters of federal law").

⁴⁴ E.g., *Welch*, 107 S. Ct. at 2948, 2958 (overruling *Parden v. Terminal Ry.*, 377 U.S. 184 (1964), with respect to state immunity from suit under the Federal Employer's Liability Act); *Green v. Mansour*, 474 U.S. 64 (1985) (limiting or rejecting *Quern v. Jordan*, 440 U.S. 332 (1979), with respect to "notice relief"); *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 118-21 (1984) (overruling cases permitting federal courts to grant injunctive relief on pendent state-law claims); *Edelman*, 415 U.S. at 670 (overruling Eleventh Amendment holdings in *Shapiro v. Thompson*, 394 U.S. 618 (1969), and three other cases).

eign immunity doctrine relies on fictions⁴⁵ and makes distinctions that are difficult to apply in practice.⁴⁶ In the law reviews, this area has been described as "little more than a hodgepodge of confusing and intellectually indefensible judge-made law"⁴⁷ and as "a complicated, jerry-built system that is fully understood only by those who specialize in this difficult field."⁴⁸ The unworkability and instability of the body of law built upon *Hans* counsel powerfully against adhering to that decision.⁴⁹

Finally, this Court has not hesitated to overrule precedents, even if they are as old as or older than *Hans*, when it finds that they are fundamentally incompatible with more recent doctrinal developments.⁵⁰ When *Hans* was decided, the doctrine of "dual sovereignty" was firmly entrenched. Applying that theory, the Court had held that the Constitution prohibited the federal government from taxing the salaries of state employees.⁵¹ In 1895, the Court concluded that Congress lacked power under the Commerce Clause to apply the antitrust laws to an entity that would refine 98 percent of the nation's sugar production, because manufacturing activities occurred solely within the borders of a single state.⁵² Since

⁴⁵ See, e.g., *Pennhurst*, 465 U.S. at 105.

⁴⁶ *Papasan*, 478 U.S. at 278; *Edelman*, 415 U.S. at 667.

⁴⁷ *Gibbons*, *supra* note 14, at 1891.

⁴⁸ *Fletcher*, *supra* note 14, at 1044.

⁴⁹ See, e.g., *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 108 S. Ct. 1133, 1140-41 (1988); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546-47 (1985).

⁵⁰ See, e.g., *South Carolina v. Baker*, 108 S. Ct. 1355, 1365 (1988), overruling *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895); *Puerto Rico v. Branstad*, 107 S. Ct. 2802, 2809-10 (1987), overruling *Kentucky v. Dennison*, 65 U.S. (24 How.) 66 (1861).

⁵¹ *Collector v. Day*, 78 U.S. (11 Wall.) 113, 128 (1871), overruled in *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466 (1939).

⁵² *United States v. E.C. Knight Co.*, 156 U.S. 1, 13-17 (1895), overruled in *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948).

the 1890s, however, federal-state relations have changed dramatically both in practice and in constitutional theory. The federal government has extended its regulatory authority over the states themselves; at the same time, it has become a significant source of financial support for state governments. This Court has repudiated the doctrine of “dual sovereignty”⁵³ and has concluded that the basic protections accorded to states lie in the structure of the federal government rather than in the judicial enforcement of unwritten constitutional protections.⁵⁴

Like *Kentucky v. Dennison*, an 1861 precedent that barred federal judicial enforcement of states’ constitutional and statutory obligations to extradite fugitives, *Hans v. Louisiana* is “the product of another time” that “has stood while the world of which it was a part passed away.” It should “stand no longer.”⁵⁵

III. Even if the Eleventh Amendment Is Held to Apply to Federal Question Cases, Congress May Abrogate Sovereign Immunity Without the State’s Consent When It Enacts Legislation Under Its Article I Powers.

Even if the Court does not take this occasion to restore federal court jurisdiction over unconsenting states to the full extent warranted by the historical evidence, it should affirm the decision of the Court of Appeals. Congress must have full authority to implement national policy when it acts pursuant to its delegated powers. The Court should make clear that Congress may unilaterally abrogate state immunity from suit by private parties, regardless of their citizenship, when it enacts substantive statutes pursuant to its Article I powers.⁵⁶

⁵³ See *FERC v. Mississippi*, 456 U.S. 742, 761 (1982).

⁵⁴ *South Carolina v. Baker*, 108 S. Ct. 1355 (1988); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). As this Court has repeatedly acknowledged, no constitutional text accords a state sovereign immunity from suits by its own citizens. See, e.g., *Atascadero*, 473 U.S. at 238; *Hans*, 134 U.S. at 10.

⁵⁵ *Puerto Rico v. Branstad*, 107 S. Ct. at 2809-10.

⁵⁶ Recent opinions have assumed without deciding that “the authority of Congress to subject unconsenting States to suit in fed-

A. The Power to Subject States to Suit in Federal Court Is Necessary and Proper for the Enforcement of Substantive Policies Adopted by Congress in the Exercise of its Article I Authority.

The Framers believed that, to the extent that the Constitution granted lawmaking powers to the federal government, it divested the states of sovereignty⁵⁷—the conceptual basis for sovereign immunity.⁵⁸ In justification of the Supremacy Clause, Alexander Hamilton explained in *The Federalist* No. 33 that “[i]f a number of political societies enter into a larger political society, the laws which the latter may enact, pursuant to the powers intrusted to it by its constitution, must necessarily be supreme over those societies, and the individuals of whom they are composed.”⁵⁹ James Madison told the members of the First Congress, “If the power was not given, Congress could not exercise it; if given, they might exercise it, although it should interfere with the laws, or even the Constitution of the States.”⁶⁰

In turn, both Federalists and anti-Federalists agreed that the federal courts should have the power to enforce the laws enacted by Congress. During the Virginia ratification debates, James Madison stated that, “With respect to the laws of the Union, it is so necessary and expedient

eral court is not confined to § 5 of the Fourteenth Amendment.” *Welch*, 107 S. Ct. at 2946 (plurality opinion); *County of Oneida*, 470 U.S. at 252; see *Green v. Mansour*, 474 U.S. at 68.

⁵⁷ *The Federalist* No. 33, at 247 (A. Hamilton) (B. Wright ed. 1961); see *Letters from a Federal Farmer*, *supra* note 26, at 43 (anti-Federalist discussion of effects of supremacy clause on state laws and constitutions). *Accord Cohens v. Virginia*, 19 U.S. (6 Wheat.) at 382 (“powers of the Union, on the great subjects of war, peace, and commerce, and so many others, are in themselves limitations of the sovereignty of the States”).

⁵⁸ As Hamilton wrote in *The Federalist*, to the extent that state sovereignty had been alienated, “there is a surrender of this immunity [from suit by individuals] in the plan of the convention. . . .” *The Federalist* No. 81, at 511 (A. Hamilton) (B. Wright ed. 1961).

⁵⁹ *The Federalist* No. 33, *id.* at 247.

⁶⁰ *Garcia*, 469 U.S. at 549, quoting 2 Annals of Cong. 1897 (1791).

that the judicial power should correspond with the legislative, that it has not been objected to."⁶¹ A leading opponent of the Constitution conceded that "[i]t is proper the federal judiciary should have powers co-extensive with the federal legislature—that is, the power of deciding finally on the laws of the union."⁶²

Thus, when Congress properly enacts legislation that applies to states, it has the corresponding power to create private rights of action in federal court to implement and enforce that legislation. The Eleventh Amendment, which refers only to the "judicial power," need not be construed to diminish Congress' power to enforce valid substantive legislation by permitting suits against states by private parties.⁶³

When states are subject to the commands of federal law, suits against states for money damages are frequently necessary to implement federal statutory policies. True, this Court's precedents give the federal courts the authority to issue injunctions against state officials in order to compel prospective compliance with federal law.⁶⁴

⁶¹ Fletcher, *supra* note 14, at 1074 n.170 (citation omitted). *Accord The Federalist No. 80*, at 500 (A. Hamilton) (B. Wright ed. 1961); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) at 384.

⁶² *Letters from a Federal Farmer*, *supra* note 26, at 40.

⁶³ Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 Harv. L. Rev. 682, 693 (1976). The Eleventh Amendment was adopted to overturn *Chisholm v. Georgia*, a decision upholding federal court jurisdiction over a common law assumption action. In his *Chisholm* dissent, Justice Iredell asserted that Congress had not enacted any statute giving the federal courts jurisdiction to hear such actions. Accordingly, he reserved judgment on whether Congress had the power to authorize private suits against states for the recovery of money, although he expressed some doubt that the authority existed. 2 U.S. (2 Dall.) 419, 449-50 (1793). This history suggests that, at most, the Eleventh Amendment should be read as declaring that Article III did not have the self-executing effect of abrogating state sovereign immunity in federal courts. Tribe, *supra* note 63, at 694-95.

⁶⁴ *Papasan*, 478 U.S. at 278; *Ex parte Young*, 209 U.S. 123 (1908).

Nevertheless, in some instances, the payment of money to a private party is the essence of Congressional policy. The Jones Act, for example, was enacted to provide compensation to seamen injured in the course of employment.⁶⁵ Similarly, CERCLA, the statute at issue in this case, assigns the substantial costs of hazardous waste cleanups to all persons and entities that the Act defines as responsible parties. To assure that the cleanup program can be carried out as Congress intended, persons who expend funds to clean up hazardous waste sites at which states are responsible parties must be able to recover money judgments against states in federal courts.⁶⁶

In other instances, when a federal statute adopted pursuant to Article I commands or proscribes conduct by states, the availability of money damages against non-complying states may be necessary to deter violations of federal law and to assure that persons harmed by violations are made whole.⁶⁷ Enforcement by federal authorities may well be insufficient to assure compliance because of the limitations on federal resources.⁶⁸ Moreover, private enforcement may be ineffective if injunctive relief is the only permissible remedy against states in federal courts—particularly if Congress has given federal courts exclusive jurisdiction in order to secure uniformity of interpretation. The Copyright Office, for example, has recently reported that the Eleventh Amendment leaves

⁶⁵ 46 U.S.C. § 688(a) (1982), incorporating remedial provisions of Federal Employer's Liability Act, 45 U.S.C. §§ 51-60 (1982).

⁶⁶ Contrary to the suggestion of the state *amici*, *see* Brief of States of New York, et al. at 16 n.14, private citizens could not bring suit in state court in such cases, because Congress gave the federal courts exclusive jurisdiction over actions arising under CERCLA. *See* 42 U.S.C. § 9613(b) (1982).

⁶⁷ *See Parden*, 377 U.S. at 197-98. In contexts other than suits against states, the Court has repeatedly recognized the significance of these goals in the implementation of federal policy. *See, e.g.*, *Owen v. City of Independence*, 445 U.S. at 651-52; *Pfizer Inc. v. Government of India*, 434 U.S. 308, 314-15 (1978).

⁶⁸ Cf. *Cannon v. University of Chicago*, 441 U.S. 677, 707-08 & n.42 (1979).

copyright owners vulnerable to “widespread, uncontrollable copying of their works without remuneration” by state institutions.⁶⁹

Accordingly, Congress must have the option of imposing money damages against unconsenting states in order to effectuate substantive federal policies. The structure of the federal system gives states an opportunity to participate in the federal legislative process and to restrain Congressional action that might affect their institutional interests.⁷⁰ Once that process is completed, if Congress decides that national policies outweigh the states’ interest in avoiding money damages, the basic structure of our federal system requires that the states should be amenable to private suits in federal court.

⁶⁹ Register of Copyrights, U.S. Copyright Office, *Copyright Liability of States and the Eleventh Amendment* 6 (June 1988).

⁷⁰ *Garcia*, 469 U.S. at 550-57; Tribe, *supra* note 63, at 694-96 & n.71, 713; Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543 (1954).

In addition to these structural safeguards, it is common for representatives of state governments to become actively involved in the lawmaking process, as they did with regard to the 1986 CERCLA amendments. Spokesmen for various states, the National Governors’ Association, and the Association of State and Territorial Solid Waste Management Officials presented their views regarding the financial obligations and liabilities of states under the Act. *See, e.g.*, *Superfund*, *supra* note 11, at 523, 787; *Amending and Extending the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Superfund): Hearings Before the Senate Comm. on Environment and Public Works*, 98th Cong., 2d Sess. 130, 147, 161, 168, 218 (1984); *Superfund Reauthorization: Hearings Before the Subcomm. on Commerce, Transportation, and Tourism of the House Comm. on Energy and Commerce*, 98th Cong., 2d Sess. 529 (1984). Some of their suggested amendments on these issues were incorporated into the legislation. *See, e.g.*, Pub. L. No. 99-499, § 107(d)(2) (no CERCLA liability for state or local government for costs or damages as a result of emergency response actions, except for gross liability or intentional misconduct); § 104(f) (reduction of state cost-sharing percentage to 10 percent for facilities owned but not operated by state at time of disposal of hazardous substances); *id.* § 101(b) (*see Part I supra*).

B. Once Congress Has Abrogated State Immunity by Statute, There Is No Need to Find Actual or Constructive Waiver of Immunity by the State.

In *Parden v. Terminal Railway*, 377 U.S. 184 (1964), the Court appeared to endorse the foregoing analysis. The Court observed that Congress had enacted the Federal Employer’s Liability Act in the exercise of its constitutional power to regulate interstate commerce, and it explained that the “‘sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution. . . .’” *Id.* at 191 (citation omitted).

By empowering Congress to regulate commerce, then, the States necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation. Since imposition of the FELA right of action upon interstate railroads is within the congressional regulatory power, it must follow that application of the Act to such a railroad cannot be precluded by sovereign immunity. *Id.* at 192.

Yet *Parden* also relied on an alternative rationale—“constructive waiver”—which not only conflicted with the first rationale but also engendered a confusing and unworkable body of law. The Court declared that Alabama, by entering into the business of operating a railroad some 20 years after the enactment of the FELA—a statute applicable to all “common carriers”—had “necessarily consented” to suit by private parties as authorized by that statute. *Id.* at 192. “[W]hen a State leaves the sphere that is exclusively its own and enters into activities subject to congressional regulation,” the Court explained, “it subjects itself to that regulation as fully as if it were a private person or corporation.” *Id.* at 196.

In subsequent cases involving Congressional enactments under Article I, the “constructive waiver” doctrine became inextricably entangled with the distinction suggested in *Parden* between “governmental” and “proprietary” functions. Relegating *Parden* to “the area where private persons and corporations normally ran the enterprise,” the Court refused to apply the same rationale to

state hospitals and schools, which were "not operated for profit" and thus not "proprietary."⁷¹ The precise relationship between the nature of the state activity and the need for waiver of immunity by the state has, however, remained elusive.⁷²

As this Court has recognized in decisions both before and after *Parden*, the governmental-proprietary distinction is a quagmire. In 1946, all of the Justices agreed that the distinction was "untenable," lacked principled content, and should be abandoned as a criterion for intergovernmental tax immunity.⁷³ More recently, in *Garcia v. San Antonio Metropolitan Transit Authority*, the Court concluded that no principled or consistent distinctions could be drawn between activities that were or were not "traditional" or "integral" governmental functions.⁷⁴

As in *Garcia*, the futility of attempting to apply the "constructive waiver" theory in a coherent and logically justifiable manner strongly supports a shift in the underlying doctrine.⁷⁵ The concept of "constructive waiver" may have been a valiant effort to reconcile the principle of sovereign immunity with Congress' ability to subject

⁷¹ *Employees*, 411 U.S. at 284; *id.* at 296 (Marshall, J., concurring); *see Edelman*, 415 U.S. at 695 (Marshall, J., dissenting); *Brown*, *State Sovereignty Under the Burger Court—How the Eleventh Amendment Survived the Death of the Tenth*, 74 Geo. L. J. 363, 393-94 (1985).

⁷² See *Field*, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit Upon the States*, 126 U. Pa. L. Rev. 1203, 1212-18 (1978); *Nowak*, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 Colum. L. Rev. 1413, 1418-22 (1975).

⁷³ *New York v. United States*, 326 U.S. 572, 583 (1946) (opinion of Frankfurter, J., joined by Rutledge, J.); *id.* at 586 (Stone, C.J., concurring, joined by Reed, Murphy, and Burton, JJ.); *id.* at 590-96 (Douglas, J., dissenting, joined by Black, J.).

⁷⁴ 469 U.S. at 537-47.

⁷⁵ *See Gulfstream Aerospace Corp.*, 108 S. Ct. at 1140 ("the sterility of the debate between the parties illustrates the need for a more fundamental consideration of the precedents in this area").

states to monetary damages in appropriate circumstances. But the effort is unnecessary. There is no need to impute a fictional "consent" to the states, because they have surrendered their sovereignty to the extent of Congress' delegated powers. If the "governmental" or "proprietary" nature of a given state activity has some bearing on whether states should be subject to suit, it is a factor to be weighed by Congress in the political process.⁷⁶ When Congress determines that national policies so require, it should have the power under Article I to abrogate state sovereign immunity, even if the affected state activity might not be characterized as "proprietary" and even if the state has not waived its immunity.⁷⁷

Recognition of this Congressional power under Article I would be fully consistent with the Court's precedents establishing that Congress may abrogate sovereign immunity in statutes enforcing the post-Civil War amendments.⁷⁸ Although the Court stated in *Fitzpatrick v. Bitzer* that Congress acting pursuant to these amend-

⁷⁶ *Cf. Garcia*, 469 U.S. at 546-52.

⁷⁷ The Court may reasonably require clear evidence that Congress intended to do so. When a statute regulates a class of entities that may include states, Congress does not necessarily intend to treat states and private persons in precisely the same manner. Nevertheless, the "clear statement rule" set forth in *Atascadero State Hospital v. Scanlon* is far too rigid. By insisting on an unequivocal statement in the language of the statute itself, the rule encourages state defendants to try to avoid unmistakable congressional intent, *see Part I supra*, and may compel courts to deny causes of action that were intended by Congress. *Field*, *supra* note 72, at 1273; *but see In re McVey Trucking, Inc.*, 812 F.2d 311, 327 (7th Cir.) ("We will not distort our obligation to be 'certain' of Congress' intent into an invitation to thwart Congress' will"), *cert. denied*, 108 S. Ct. 227 (1987); *David D. v. Dartmouth School Comm.*, 775 F.2d 411, 422 (1st Cir. 1985), *cert. denied*, 475 U.S. 1140 (1986). Instead of looking solely at the words of the statute, the courts should consider all evidence that reflects the purpose of the statute. *Field*, *supra* note 72, at 1272-75.

⁷⁸ *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); *Hutto v. Finney*, 437 U.S. 678 (1978); *City of Rome v. United States*, 446 U.S. 156 (1980).

ments may “provide for private suits against States or state officials which are constitutionally impermissible in other contexts,” the reference is ambiguous and certainly does not foreclose abrogation when Congress enforces other constitutional provisions.⁷⁹ In subsequent opinions, the Court has stated that it has not yet decided whether Congress has power to abrogate sovereign immunity in statutes enacted pursuant to Article I.⁸⁰

As the Court of Appeals concluded in this case, there is no constitutionally significant distinction between the post-Civil War amendments and Article I of the Constitution with regard to the states’ surrender of sovereignty.⁸¹ In *Fitzpatrick*, the Court emphasized that “‘every addition of power to the general government involves a corresponding diminution of the governmental powers of the States.’”⁸² The same analysis applies—as the Court has repeatedly acknowledged—to the powers of Congress under Article I.⁸³ Article I gives Con-

⁷⁹ 427 U.S. at 456 (citing two cases in which Congress had not expressly authorized private suits against states). The Court may have meant only that private citizens may not sue states in the absence of express Congressional authorization. *See id.* at 452 (“Our analysis begins where *Edelman* ended, for in this Title VII case the ‘threshold fact of congressional authorization,’ *id.*, at 672, to sue the State as employer is clearly present.”); Field, *supra* note 72, at 1237-39. Alternatively, the Court may have been referring to Congress’ power under the Commerce Clause to impose substantive obligations on states *qua* states, which had been curtailed during the same Term in *National League of Cities v. Usery*, 426 U.S. 833 (1976). *See* Field, *supra* note 72, at 1232-35.

⁸⁰ *See* note 56 *supra*.

⁸¹ Pet. App. 40a-45a; *see McVey Trucking*, 822 F.2d at 315-21.

⁸² 427 U.S. at 455, quoting *Ex parte Virginia*, 100 U.S. 339, 346-48 (1880).

⁸³ *Garcia*, 469 U.S. at 548 (Article I, Section 8 causes a “sharp contraction of state sovereignty by authorizing Congress to exercise a wide range of legislative powers and (in conjunction with the Supremacy Clause) to displace contrary state legislation.”); *Hodel v. Virginia Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 290-92 (1981); *Parden*, 377 U.S. at 191-92; *United States v. California*, 297 U.S. 175, 184-85 (1936).

gress plenary power over enumerated subjects and express authority to enact “necessary and proper” implementing legislation.⁸⁴ Accordingly, the rationale of *Fitzpatrick v. Bitzer* supports the Court of Appeals’ decision in this case.

Over the years, this Court has developed a series of exceptions to sovereign immunity to assure the enforcement of federal law. The Court has adhered to the fiction of *Ex parte Young* because it is “necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to ‘the supreme authority of the United States.’”⁸⁵ *Fitzpatrick v. Bitzer* rests on a similar basis. As commentators have noted, neither the language of the post-Civil War amendments nor the history of their adoption expressly indicates that they were intended to limit the reach of the Eleventh Amendment or to expand the power of the federal courts.⁸⁶

If the Court decides to proceed in an incremental fashion in this area, rather than to declare that the Eleventh Amendment applies only to pure diversity cases against states, its next step should be to recognize Congress’ authority to subject states to private suits in federal court when it deems such suits necessary to implement its authority under Article I.

⁸⁴ *See McVey Trucking*, 812 F.2d at 319-21.

⁸⁵ *Pennhurst*, 465 U.S. at 105; *see Green v. Mansour*, 474 U.S. at 68 (“the availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause”).

⁸⁶ *See, e.g.*, Field, *supra* note 72, at 1230; Nowak, *supra* note 72, at 1454 (“There are no extant materials from the drafting or debate of the fourteenth amendment which indicate that the framers of that amendment ever considered whether it would be possible for a private citizen to sue a state government for damages in a federal court because the state had violated the principles of the amendment.”).

CONCLUSION

For these reasons, the judgment of the court below should be affirmed.

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11
IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

- v. -

UNION GAS COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF NATIONAL MUSIC PUBLISHERS'
ASSOCIATION, INC.; AMERICAN SOCIETY OF
COMPOSERS, AUTHORS AND PUBLISHERS;
BROADCAST MUSIC, INC.; MUSIC
PUBLISHERS' ASSOCIATION OF THE UNITED STATES;
AND THE SONGWRITERS GUILD OF AMERICA
AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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No. 87-1241

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

COMMONWEALTH OF PENNSYLVANIA,

Petitioner.

— v. —

UNION GAS COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
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BRIEF OF NATIONAL MUSIC PUBLISHERS'
ASSOCIATION, INC. ; AMERICAN SOCIETY OF
COMPOSERS, AUTHORS AND PUBLISHERS;
BROADCAST MUSIC, INC. ; MUSIC
PUBLISHERS' ASSOCIATION OF THE UNITED STATES;
AND THE SONGWRITERS GUILD OF AMERICA
AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

This *amicus curiae* brief is submitted in support of the position of respondent Union Gas Company on the third question presented, concerning Congress' power to abrogate Eleventh Amendment immunity under Article I of the Constitution. By letters filed with the Clerk of the Court, petitioner and respondent have consented to the filing of this brief.

Interest Of *Amici Curiae*

These *amici* are organizations representing the interests of thousands of music copyright owners and the entities which publish their music and collect the copyright royalties which are their principal source of income. The value and enforceability of copyrights are, quite simply, the lifeblood of the music industry.

These *amici* have a direct interest in the outcome of this case because that lifeblood flows from an act of Congress, the Copyright Act of 1976, 17 U.S.C. § 101 *et seq.*, enacted under Article I of the Constitution. The Copyright and Patent Clause of that Article gave Congress the power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . ." U.S. Const., Art. I, § 8, Cl. 8.

In *Goldstein v. California*, 412 U.S. 546 (1973), this Court reiterated the doctrine that the Copyright and Patent Clause established Congress' *exclusive* power to provide for a *uniform* national system of copyright and patent protection. As this Court there recognized, "the objective of the Copyright Clause was clearly to facilitate the granting of rights national in scope." *Id.* at 555. Thus, the system of rights and remedies established by Congress pursuant to that Clause is so "pervasive [that] no citizen *or State* may escape its reach." *Id.* at 560 (emphasis added). A cornerstone of this uniform system of copyright and patent rights and remedies is Congress' grant to the federal courts of *exclusive* jurisdiction over copyright and patent cases. 28 U.S.C. § 1338(a). The objective was to keep state courts out of the lawmaking process in these critical spheres. *See, e.g., Sears, Roebuck & Co. v. Stiffel & Co.*, 376 U.S. 225, 231 (1964).

Given this Court's recognition of the need for a uniform national system of copyrights and patents, and Congress' grant of exclusive jurisdiction to the federal courts, a ruling in this case that Congress may

not abrogate the states' Eleventh Amendment immunity in Article I legislation would have a substantial negative impact on these *amici*. For the fifty states and their thousands of agencies and instrumentalities are increasingly significant users of intellectual property protected by copyrights and patents. States and their agencies utilize, exhibit, perform and copy these protected works thousands of times every day. In school and college concert halls and football stadiums, on college and public radio stations, and at fraternity social functions, copyrighted music is repeatedly performed, played and danced to; copyrighted motion pictures are exhibited on state college campuses and at state prisons; the latest scientific technology and electronic know-how are utilized by state instrumentalities in great profusion.

As these *amici* have argued in several federal Courts of Appeals, the Copyright Act of 1976 unequivocally expresses Congress' intent that the fifty states either pay copyright royalties or be subject to suit in federal court if they do not.¹ But a ruling from this Court that Congress does not possess the power to abrogate under Article I would open the door wide for state instrumentalities to utilize the creative and scientific work of others — from popular songs to modern symphonies, from the latest movies to lengthy literary manuscripts, from

¹ These *amici* have submitted *amicus curiae* briefs to the Fourth, Sixth and Ninth Circuits, addressing the issue of congressional abrogation of state immunity under the Copyright Act. *Mihalek Corp. v. Michigan*, 814 F.2d 290 (6th Cir.), *cert. denied*, 108 S. Ct. 503 (1987); *BV Engineering v. University of California, Los Angeles*, Docket No. 87-5920 (9th Cir.); *Richard Anderson Photography v. Radford University*, Docket No. 87-1610 (4th Cir.).

These submissions demonstrated (1) that Congress' intent to abrogate the states' Eleventh Amendment immunity is clear on the face of the Copyright Act and, (2) alternatively, that the state had waived its Eleventh Amendment immunity by its purposeful and affirmative conduct in a sphere regulated exclusively by an act of Congress, under this Court's "consent" doctrine of *Parden v. Terminal Ry.*, 377 U.S. 184 (1964). In addition, the Fourth and Ninth Circuit briefs addressed the Article I abrogation issue now before this Court. In *Mihalek*, the Sixth Circuit did not reach the Eleventh Amendment issue. The decisions of the Fourth and Ninth Circuits are still pending.

computer software to patented machinery — all without having to fear suit for failure to pay royalties, as every other user would. Because copyright suits can be brought *only* in federal court, the ultimate effect of such a ruling would be to grant the states a sweeping license to use all copyrighted works “with impunity” — at least until each copyright owner discovers ongoing infringement and can seek whatever limited injunctive relief may be available against future use.²

Accordingly, these *amici* join respondent and other *amici curiae* in urging this Court to affirm the holding below that Congress may abrogate states’ Eleventh Amendment immunity when acting under Article I of the Constitution.³

Summary Of Argument

The purpose of the Eleventh Amendment is to limit judicial action, not to curtail Congress’ power. Without the power to abrogate

² Several federal courts have considered the question of Eleventh Amendment immunity in copyright and patent cases in recent years, and a split of authority has begun to develop. *Compare, e.g., Mills Music, Inc. v. Arizona*, 591 F.2d 1278 (9th Cir. 1979); *Johnson v. University of Virginia*, 606 F.Supp. 321 (W.D. Va. 1985); and *Lemelson v. Ampex Corp.*, 372 F.Supp. 708 (N.D. Ill. 1974) with *BV Engineering v. University of California, Los Angeles*, 657 F.Supp. 1246 (C.D. Cal. 1987); *Richard Anderson Photography v. Radford University*, 633 F.Supp. 1154 (W.D. Va. 1986); *Cardinal Industries, Inc. v. Anderson Parrish Assocs.*, No. 83-1038, slip op. (M.D. Fla. Sept. 6, 1985), *aff’d without opinion*, 811 F.2d 609 (11th Cir.), *cert. denied*, 108 S. Ct. 88 (1987); *Woelffer v. Happy States of America, Inc.*, 626 F.Supp. 499 (N.D. Ill. 1985); and *Mihalek Corp. v. Michigan*, 595 F.Supp. 903 (E.D. Mich. 1984), *aff’d on other grounds*, 814 F.2d 290 (6th Cir.), *cert. denied*, 108 S. Ct. 503 (1987). Thus, assuming a decision in this case that Congress may abrogate under its Article I powers, the question whether it *has* done so in the Copyright Act of 1976 may soon be ripe for decision by this Court.

³ These *amici* have no direct interest in the CERCLA statute at issue in this case — except to the extent that it, too, is an Article I enactment — and they therefore take no position on the first issue presented by petitioner. They also take no position on whether *Hans v. Louisiana*, 134 U.S. 1 (1890), should be overruled, as respondent and *amicus* Chemical Manufacturers Association (CMA) urge in their briefs, since it is unnecessary for the Court to overrule *Hans* in order to hold that Congress may abrogate state immunity when acting pursuant to Article I powers. Nonetheless, these *amici* would not oppose the overruling of *Hans*.

under Article I, Congress would remain unable to implement in a consistent and uniform fashion the very legislative responsibilities conferred on it by Article I.

Because the federal courts have exclusive jurisdiction over copyright suits, the effect of a holding by this Court that Congress may not abrogate state immunity under Article I would be to deny copyright owners a damage remedy entirely. That result would frustrate the congressional mandate to create a uniform national system of copyright and patent protection.

This Court’s prior decisions strongly suggest that Congress has the power to abrogate state immunity when it acts pursuant to its Article I powers. By fashioning a rule that Congress’ intent to abrogate must be clear on the face of its enactments, this Court has implicitly acknowledged that Congress has the authority to abrogate — and may do so when that intention is made explicit.

Argument

CONGRESS MAY ABROGATE THE STATES’ ELEVENTH AMENDMENT IMMUNITY WHEN ACTING PURSUANT TO ITS ARTICLE I POWERS

A. There Is No Constitutionally Significant Reason To Exclude Article I Enactments From Congress’ Abrogation Power

As respondent and *amicus* CMA persuasively argue in their briefs, there is compelling historical and constitutional support for Congress’ power to abrogate state immunity when legislating under Article I. The history of the Eleventh Amendment reveals that its intended purpose was to limit judicial action, not to curtail Congress’ power. Integral to the Framers’ federal vision is the concept that the states, upon ratifying a Constitution that granted law-making powers to Congress in specific areas, “surrendered a portion of their sovereignty” in those domains. *Parden v. Terminal Ry.*, 377 U.S. 184, 191

(1964). Thus, when Congress legislates pursuant to an express grant of authority under Article I, it is also free to make such enactments enforceable against the states by creating private rights of action against the states in federal court. That power is necessary and proper if Congress is effectively to enforce the laws it enacts under its plenary constitutional authority.

Consistent with these principles, every federal appellate court that has expressly decided whether Congress has power to abrogate state immunity under Article I and other plenary powers has held, as did the Third Circuit here, that Congress may abrogate state immunity when it acts pursuant to such powers. *In re McVey Trucking, Inc.*, 812 F.2d 311, 323 (7th Cir.) (Bankruptcy Clause, Art. I, § 8, Cl. 4), *cert. denied*, 108 S. Ct. 227 (1987); *County of Monroe v. Florida*, 678 F.2d 1124, 1133 (2d Cir. 1982) (Extradition Power, Art. IV, § 2, Cl. 2), *cert. denied*, 459 U.S. 1104 (1983); *Peel v. Florida Dep't of Transportation*, 600 F.2d 1070, 1080 (5th Cir. 1979) (War Powers Clauses, Art. I, § 8, Cl. 11-13); *Mills Music, Inc. v. Arizona*, 591 F.2d 1278, 1285 (9th Cir. 1979) (Copyright and Patent Clause, Art. I, § 8, Cl. 8); *Jennings v. Illinois Office of Education*, 589 F.2d 935, 937 (7th Cir.) (War Powers Clauses), *cert. denied*, 441 U.S. 967 (1979).

Perhaps the most learned and exhaustive judicial analysis of this issue was that undertaken by Judge Flaum in *In re McVey Trucking, Inc.*, *supra*. The *McVey* opinion began by noting that this Court has made clear that Congress may abrogate state immunity without consent when it acts pursuant to its power under section 5 of the Fourteenth Amendment. 812 F.2d at 314; *see Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). The Seventh Circuit then considered whether there is any constitutionally significant reason to distinguish the grant of power to Congress under the Fourteenth Amendment from those under Article I. After exploring the various theories that have been advanced to draw that distinction, it concluded that there is no viable basis for such a distinction. Article I and the Fourteenth Amendment

are both plenary grants of power to Congress; there is no reason to conclude that "the plenary power of the Fourteenth Amendment grants Congress any more power to bring an unconsenting state into federal court than does the plenary power of Article I." *McVey*, 812 F.2d at 321. Thus, the Seventh Circuit held that Congress is empowered to abrogate by legislating under the Bankruptcy Clause of the Constitution, Article I, § 8, Cl. 4.

As the Seventh Circuit in *McVey* and the Third Circuit here both concluded, there is no sound reason for limiting Congress' abrogation powers to Fourteenth Amendment legislation; its original powers under Article I are at least as critical to the framework of our federal system as its Fourteenth Amendment powers. As Professor Tribe has observed:

it remains true after the eleventh amendment, . . . that Congress, acting in accordance with its article I powers as augmented by the necessary and proper clause, . . . can effectuate the valid substantive purposes of federal law by . . . compelling states to submit to adjudication in federal courts

Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 Harv. L. Rev. 682, 694 (1976). Indeed, without this power, Congress would remain utterly unable to implement in a consistent and uniform fashion the very legislative responsibilities conferred on it by Article I. Thus, as this Court itself has previously observed, if the Eleventh Amendment were construed to bar private suits seeking to enforce Article I restrictions on state power, these restrictions would become "nullified and made of no effect." *Prout v. Starr*, 188 U.S. 537, 543 (1903).

Nowhere would such "nullification" be more effective than in the enforcement of the rights granted by Congress under the Copyright and Patent Clause of Article I. Because Congress has, consistent with

the constitutionally mandated objective of creating a uniform national system of copyright and patent protection, given the federal courts exclusive jurisdiction over copyright suits (as it has also in the realms of bankruptcy, admiralty and antitrust), the result of upholding Eleventh Amendment immunity in copyright suits would be to deny any damage remedy whatever against state infringers. That result would contradict the time-honored common law precept that “[i]f the plaintiff has a right, he must of necessity have means of vindication . . . Right and remedy . . . are reciprocal.” *Ashby v. White*, 87 Eng. Rep. 808 (Q.B. 1702). It would leave copyright and patent owners without any means of redress against a significant class of infringers, in contrast to previous Eleventh Amendment decisions of this Court, such as *Employees v. Department of Public Health and Welfare*, 411 U.S. 279 (1973), *Edelman v. Jordan*, 415 U.S. 651 (1974) and *Welch v. State Dep’t of Highways and Public Transp.*, 107 S.Ct. 2941 (1987), in which the applicable acts of Congress did not create remedies enforceable exclusively in federal court.

Eliminating the prospect of any damage suits at all against the states would be especially harmful to the economic livelihood of those in the music copyright industry represented by these *amici*. It is no secret that much of today’s popular music has a very limited life-span. By the time a copyright owner has discovered that a state agency has copied or performed a current song, the chances are high that the song will no longer have any commercial vitality, and an injunction against future use will offer little vindication. In such circumstances, with no damages available, the deterrent effects upon copyright infringers envisioned by Congress would be entirely lost. And that in turn would frustrate the entire notion of a uniform national system of protection as envisioned by the Copyright and Patent Clause. See *Goldstein v. California*, 412 U.S. at 555-56. For that reason, a holding by this Court that Congress may not abrogate Eleventh Amendment immunity under any of its Article I powers would deal a devastating blow to

everyone whose livelihood is dependent on copyrights and patents. Accordingly, these *amici* join in urging affirmance of the decision of the Third Circuit on the Article I abrogation issue.

B. This Court’s Previous Decisions Suggest That Congress May Abrogate State Immunity Under Its Article I Powers

Although this Court has never expressly held that Congress may abrogate state Eleventh Amendment immunity when it acts pursuant to its authority under Article I of the Constitution, the prior decisions of this Court do not, as petitioner argues, point in the opposite direction. Rather, this Court has strongly and repeatedly suggested that Congress does possess that power.

In *Parden v. Terminal Ry.*, *supra*, this Court expressly recognized that Congress possesses the authority under Article I to subject the states to suit in federal court pursuant to its Commerce Clause power. No other conclusion reasonably flows from this Court’s declaration in *Parden* that “the States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce.” 377 U.S. at 191. The holding in *Parden* turned on the further determination that the state had impliedly “consented” to suit by operating a railroad in the face of congressional regulation. But this Court clearly first determined — as it must have — that Congress had the power to enact that regulation and bind the states thereby.⁴

Parden was followed by *Employees v. Department of Public Health and Welfare*, 411 U.S. 279, 283 (1973), in which this Court reaffirmed Congress’ power to make the states amenable to suit in federal court.

⁴ This Court made clear in *Welch v. State Dep’t of Highways and Public Transp.*, 107 S. Ct. 2941, 2948 (1987), that it was ...ere overruling *Parden* only to the extent that it was “inconsistent with the requirement that an abrogation of Eleventh Amendment immunity by Congress must be expressed in unmistakably clear language” Nothing in *Welch* disturbs the recognition in *Parden* that Congress has power to abrogate under the Commerce Clause. See *id.* at 2948 n.8.

Implicit in this Court's declaration in *Employees* that immunity will not be lifted absent a clear showing of congressional purpose is the assumption that Congress has authority to lift the veil of immunity when such intent is evident.

In *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), this Court expressly asked whether, if the Rehabilitation Act had been enacted pursuant to Congress' Article I powers, there would be sufficient evidence of congressional intent to overcome Eleventh Amendment immunity. *Id.* at 246-47. Once again, although this Court found no such clear indication, that the question was asked at all demonstrates this Court's belief that Congress may abrogate the states' Eleventh Amendment immunity under its Article I powers.

Six months later, in *Green v. Mansour*, 474 U.S. 64 (1985), far from suggesting that the abrogation test was restricted to statutes enacted pursuant to Congress' Fourteenth Amendment powers, as petitioner argues, this Court stated simply that Congress must act "pursuant to a valid exercise of power." *Id.* at 68.

And, most recently, in *Welch v. State Dep't of Highways and Public Transp.*, *supra*, this Court assumed, without deciding, that Congress could abrogate under its Article I powers. 107 S. Ct. at 2946. Significantly, in *Welch*, this Court expressly declared that it was not questioning the validity of its prior holding in *Parden* that "Congress has the power to abrogate the States' Eleventh Amendment immunity under the Commerce Clause." *Id.* at 2948 n.8.

Fitzpatrick v. Bitzer, *supra*, is fully consistent in this regard with the above cases. In holding that Congress has the power to abrogate state immunity pursuant to section 5 of the Fourteenth Amendment, *Fitzpatrick* nowhere cast doubt on Congress' authority to abrogate under any of its Article I powers. On the contrary, *Fitzpatrick* reiterated that the congressional abrogation upheld in *Parden* "was

based on the power of Congress under the Commerce Clause" 427 U.S. at 452. ⁵

Petitioner places primary reliance upon the following statement in *Fitzpatrick*:

We think that Congress may, in determining what is "appropriate legislation" for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts. See *Edelman v. Jordan*, 415 U.S. 651 (1974); *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945).

Id. at 456 (footnote omitted).

Contrary to petitioner's interpretation, the phrase "constitutionally impermissible in other contexts" cannot be read to question Congress' authority to abrogate state immunity under its Article I powers. The two cases cited directly following that ambiguous phrase clarify what "other contexts" the statement refers to — *i.e.*, contexts in which there has been no act of Congress expressly making the states amenable to suit in federal court. Significantly, neither of the two cases even addressed the issue of Congress' authority to abrogate state immunity under Article I. In *Edelman*, "the threshold fact of congressional authorization to sue a class of defendants which literally includes States [was] wholly absent." 415 U.S. at 672. Since this Court held that Congress had not authorized abrogation, the issue of whether it had the power to abrogate did not arise. The second case, *Ford Motor Co.*, involved a *state* statute, not an act of Congress, and so has nothing at all to do with congressional abrogation. Since neither case addressed Congress' power to impose suit upon the states, the quoted statement from *Fitzpatrick* does not cast doubt on Congress' authority to abrogate under any of its powers — Article I or otherwise.

⁵ Moreover, two separate concurrences in *Fitzpatrick* expressly concluded that the congressional abrogation at issue was authorized by the Commerce Clause. 427 U.S. at 458 (Brennan, J., concurring in the judgment); *id.* (Stevens, J., concurring in the judgment).

Conclusion

For the foregoing reasons, these *amici* respectfully ask this Court to affirm the Third Circuit's holding that Congress, when legislating pursuant to power granted by Article I of the Constitution, may abrogate Eleventh Amendment immunity and subject the states to suit in federal court.

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Respectfully submitted,

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